Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

AMIEL CUETO,
Petitioner,

v.

UNITED STATES OF AMERICA.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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148 pp

QUESTIONS PRESENTED FOR REVIEW

I

In federal criminal cases, is the "prescribed statutory maximum" referred to in the holding of *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000), found *not* in the statute that defines the crime; but rather, is the prescribed statutory maximum found in the statute 18 U.S.C. 3551, *et seq*, the Sentencing Reform Act?

II

In federal criminal cases, even if the "prescribed statutory maximum" is in the statute that defines the crime, does the rule in *Apprendi* operate to prohibit a judge from increasing the sentence beyond that maximum, based on post-verdict findings of fact that are determined by the judge, not the jury, and that are not proved beyond a reasonable doubt?

III

If a prisoner's direct appeal was exhausted prior to this Court's opinion in *Apprendi*, is that prisoner's motion for relief under 28 U.S.C. 2255 procedurally barred under *U.S. v. Frady*, 456 U.S. 152 (1982)?

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The Order and Memorandum and Order of the Honorable Stephen N. Limbaugh, dated August 18, 2000; the Order of the Honorable Stephen N. Limbaugh, dated January 26, 2001; and the Order of the U.S. Seventh Circuit Court of Appeals denying the Certificate of Appealability, dated March 5, 2001. See Appendix A at A-1, Appendix B at A-40 and Appendix C at A-41 respectively.

JURISDICTION OF THIS COURT

The judgement of the Seventh Circuit Court of Appeals was entered on March 15, 2001 (See Appendix C at A-41). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §371 provides:

Conspiracy to commit offense or defraud United States.

If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer

who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. §3551 provides:

(a) In general. Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals. An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to:

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

28 U.S.C. §144 provides:

Bias or prejudice of judge

Whenever a party of any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455(a) provides:

Disqualification of justice, judge, or magistrate

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from:

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. §2255 provides:

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

U.S. Const., Amendment I provides:

Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., Amendment XIV provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 11, 1997, after an eleven-week trial, the jury found petitioner Amiel Cueto guilty of the following:

COUNT 1: Conspiracy to Commit an Offense, charged under 18 U.S.C. 371.

COUNTS 2, 6 & 7: Obstruction of Justice, each charged under 18 U.S.C. 1503.

Cueto was acquitted of one other count charging Conspiracy to Commit an Offense, and two other counts of Obstruction of Justice.

On September 19, 1997, the Honorable Stephen N. Limbaugh, who had presided over the trial, conducted a sentencing hearing. No witnesses were called, nor was any evidence received at the hearing. Judge Limbaugh determined that the facts found by the jury in the charges which the jury had found Cueto guilty of, authorized a prescribed range of penalties at base-level 12 of the sentencing guidelines, promulgated under the Sentencing Reform Act, 18 U.S.C. 3551, *et seq*. U.S.S.G. §2J1.2. See Appendix D at A-52-53, an excerpt from the transcript of the sentencing hearing. The maximum sentence in the range prescribed by base-level 12 was sixteen months imprisonment. U.S.S.G. §5A.

After determining the prescribed range of penalties that applied to Cueto as authorized by the jury's verdict, Judge Limbaugh then proceeded to assess seven post-verdict "facts".

First, Judge Limbaugh found that there "were officials holding high level decision-making or sensitive positions"; and "(n)ow in making this finding, I'm not finding that these persons were guilty as co-conspira-

tors". Judge Limbaugh then added: "I am simply finding that they were involved for the purpose of applying the enhancement provision of this particular section of the guidelines." See Appendix D at A-54. It must be emphasized that no officials - high-ranking or otherwise - were convicted or even charged in the case at bar. Based on this "fact", Judge Limbaugh increased the penalty by eight levels. See Appendix D at A-54.

Second, Judge Limbaugh found as a fact that "there is ample evidence in this matter to show that the defendant was an organizer and leader of a criminal activity". See Appendix D at A-54.

Third, Judge Limbaugh found as a fact that said criminal activity "involved five or more participants, or that was otherwise extensive". See Appendix D at A-54.

Based on the second and third "facts", Judge Limbaugh increased Cueto's sentence by four offense levels. See Appendix D at A-54.

Fourth, Judge Limbaugh found as a fact "that the defendant did in fact perjure himself, both to me and the jury". See Appendix D at A-58. Based on this "fact" the Judge increased the sentence by two levels. See Appendix D at A-58.

Fifth, Judge Limbaugh found "in fact" that Cueto had caused an "unnecessary expenditure of governmental or court resources, and which warrants the addition of three levels". See Appendix D at A-63.

Sixth, Judge Limbaugh found as a fact: "I am convinced that the defendant, as an officer of this court, abused his position as an officer of the court". Based on this "fact", Judge Limbaugh increased Cueto's sentence by two levels. See Appendix D at A-64

Seventh, over and above and in addition to the "facts" assessed above, the Judge found as a fact that Cueto had written and published offensive newspaper editorials in his newspaper the *East Side Review*; and based on that "fact", Cueto "should be punished". This "fact" found by Judge Limbaugh, is at page 65 of the sentencing transcript (Appendix D at A-66). Judge Limbaugh called Cueto to the podium in front of the bench, where he explained the basis for this finding of fact:

> "Mr. Cueto, if you and counsel will come forward please.
>
> "I really feel that one of the jewels of our system is the First Amendment.
>
> "And the First Amendment gives all of us unprecedented rights that other people in the world do not have.
>
> "It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.
>
> "And for that you should be punished."[1]

---

[1] There is no doubt that the Judge was referring to Cueto's newspaper articles and editorials. Judge Limbaugh filed an order on January 25, 2000, denying a motion to disqualify the Judge under 28 U.S.C. 144 and 455, in which he said:

> "The newspaper articles referred to are in connection with a newspaper owned and published by defendant Cueto called the East Side Review. In the East Side Review, Cueto personally authored several articles in which he complained of prosecutorial misconduct in association with the racketeering case and maligned the integrity and reputations of several Assistant United States Attorneys involved in the investigation and prosecution of the racketeering case." See Appendix E at A-67.

To sum up, Judge Limbaugh assessed seven post-verdict "facts": 1) High-ranking officials were "involved" in the crime, even though no officials were charged in the case at bar; 2) Cueto was an organizer and leader; 3) Cueto's crime involved five or more persons or was otherwise extensive; 4) Cueto had perjured himself when he'd testified in his own defense at trial; 5) Cueto had caused an unnecessary expenditure of governmental or court resources; 6) Cueto had abused his position as an officer of the court; and 7) Cueto had abused the First Amendment and had treated that Amendment with license, by publishing offensive newspaper articles and editorials more than a year prior to his indictment, which had "maligned the integrity and reputations of several Assistant United States Attorneys". See Appendix E at A-67.

After finding the above "facts", Judge Limbaugh pronounced sentence. *Imprisonment*: Count 1, 60 months. Count 2, 87 months. Count 6, 87 months. Count 7, 87 months. The terms of imprisonment were imposed concurrently. *Fines*: Count 1, $20,000. Count 2, $20,000. Count 6, $20,000. Count 7, $20,000. The fines were imposed consecutively, for a total fine of $80,000. *Costs of imprisonment*: Assessed at $500 for each month of incarceration. *Supervised release*: Two years. See Appendix F at A-68, which is the Judgment and Commitment Order.

None of the seven post-verdict facts found by Judge Limbaugh was charged in the Indictment. See Appendix G at A-80. None of these seven facts was submitted to the jury, nor proved beyond a reasonable doubt.

The "facts" found by the jury authorized a range of penalties, as prescribed in the statutory scheme, the

Sentencing Reform Act. This was base-level 12, and the prescribed statutory maximum was sixteen months imprisonment. However, based on Judge Limbaugh's post-verdict findings of fact, the Judge increased the sentence beyond that maximum to eighty-seven months.

Irrespective of the statutory maximum for Cueto's case as prescribed under the Sentencing Reform Act; the maximum sentence provided for in 18 U.S.C. 371, was five years in prison and a $10,000 fine. The maximum sentence provided for in 18 U.S.C. 1503 for acts committed before September 13, 1994, was five years in prison and a $5,000 fine.

Prior to indictment, Amiel Cueto was a lawyer practicing in the state and federal courts, mostly in southern Illinois. He was also the publisher of a newspaper of general circulation in the Illinois metro-east St. Louis area, called the *East Side Review*. Cueto's newspaper was often critical of law enforcement authorities, including federal prosecutors. As example, see Appendix H at A-116, which is an excerpt from the March 6, 1995 edition of *East Side Review*. This was an editorial cartoon parody of W. Chuck Grace (the U.S. Attorney for the Southern District of Illinois), Michael Carr (the chief of the criminal division in the U.S. Attorney's Office), and other assistant U.S. Attorneys.

On May 2, 1995, Mr. Grace, the U.S. Attorney sent a secret letter to Mary Robinson, the Administrator of the Attorney Registration and Disciplinary Commission (ARDC), which is the Illinois state agency that regulates lawyer discipline. The Grace-letter is Appendix I at A-117.[2]

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[2] Grace knew that a lawyer has no right to invoke the Fifth Amendment to refuse to answer the Administrator's demand for

(Continued on next page)

Along with his letter, Grace thought it was important to enclose "pertinent editions of the by-monthly (sic) newspaper, the *East Side Review* which is published by a corporation established by Mr. Cueto and which has been published every two weeks".

After the U.S. Attorney's Office received the statement it had surreptitiously compelled from Cueto, the Indictment was returned. See Appendix G at A-80.

Count 1 alleged Conspiracy to Commit an Offense under 18 U.S.C. 371. The jury could have found Cueto guilty of Count 1 based on paragraph 43. See page 17 of Appendix G at A-95-96.

(Footnote 2 continued)

responsive statement, unless the lawyer is informed that he is under criminal investigation. *In Re Zisook*, 88 Ill.2d 321, 430 N.E 2d 1031 (1981). Therefore, Grace told the Administrator to initiate an investigation so that she could demand a detailed response to Grace's questions from Cueto (whom Grace referred to as "the subject" of Grace's criminal investigation). But see Appendix I at A-118, after the Administrator - acting for the U.S. Attorney - received Cueto's "responsive statement", she was instructed by Grace to shut her investigation down. That is indeed what happened. Grace then took this statement and used the exculpatory parts to modify and shift and structure a prosecution to get around Cueto's known defenses. The parts deemed to be inculpatory were used as evidence against Cueto at trial (over objection). Thus Cueto was effectively compelled to be a witness against himself in the criminal case.

The Grace letter was never disclosed by the government either before, during, or after trial. It was found inadvertently when one of Cueto's lawyers was conducting an inspection of Cueto's file in the Administrator's office in Chicago. The Grace letter was the first basis Cueto pleaded for relief under §2255, but Judge Limbaugh denied the motion.

> "43. It was further a part of the conspiracy that in January 1995 CUETO caused to be published through the Century Printing Company, a newspaper tabloid known as the East Side Review which he then caused to be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did threaten by intimidation in the East Side Review that he would prosecute Robinson if CUETO won the election for State's Attorney."

Cueto is the first person since the Sedition Act, 1 Stat 596 (1798), expired by its own terms on March 4, 1801, to be convicted of the crime of having "caused to be published ... a newspaper." Please note that the offensive article/editorial was published in the *East Side Review* in January, 1995, a year and a half before Cueto was indicted.

Count 2 is in paragraph 64 of Appendix G at A-103. The charge was that Cueto had obstructed justice in violation of 18 U.S.C. 1503, by Cueto's having filed a "false" brief in this Court in May of 1994, on behalf of his client Thomas Venezia, in a civil injunction case. The brief was heavily redacted and then admitted into evidence over defense objection. See Appendix J at A-119, which is a copy of the government's trial exhibit. The brief was alleged to be "false" in that it had used an intemperate word, the verb "vilified":

> "(Cueto's brief) attacked the integrity of the judges on the Court of Appeals claiming, among other things, that the federal appellate court judges had 'vilified' Venezia." See paragraph 32 of Appendix G at A-92.

Cueto is the first (and so far the only) person in American history, to be convicted of a crime for filing a brief in the U.S. Supreme Court.

It has never been disputed that the obstruction of justice alleged in Count 2 was before September 13, 1994. See Appendix J at A-119, which shows that the brief was filed in May 1994.

Count 6 is in paragraph 73 of Appendix G at A-106-107. Here Cueto is charged with "engaging in acts to persuade the St. Clair County State's Attorney to indict" a corrupt state agent who was also an FBI informer. The "acts to persuade" Cueto had engaged in, were the writing of two letters to the state's attorney, dated January 21, 1994, and June 15, 1994. See Appendix K at A-124. It has never been in dispute that the "acts to persuade the State's Attorney to indict" were before September 13, 1994.

Count 7 is in paragraph 75 Appendix G at A-107. The charge was that Cueto had obstructed justice by "preparing and filing and causing to be prepared and filed false pleadings and court papers". It has always been undisputed that no one (except perhaps the grand jury) knows the identity of these false pleadings and court papers. Despite repeated requests by the defense before, during and after trial, neither the prosecution, nor Judge Limbaugh, was ever able to identify the documents which the grand jury had referred to in Count 7. Professor Alan Dershowitz, who represented Cueto on direct appeal, asked in the opening brief, the reply brief, and at oral argument, for the Seventh Circuit to direct the prosecution to identify the documents referred to in Count 7; but the prosecution could not do so, and the Seventh Circuit declined to address the issue.

The defense believes that Count 7 may refer to a draft-motion Cueto prepared in 1992 or 1993, to disqualify Judge William Stiehl in the Venezia injunction case.

(The grand jury would have had this document because the FBI had raided Venezia's office and seized all his papers.) But it must be emphasized that this pleading/court paper was never filed, nor was it introduced into evidence at Cueto's trial. The defense advanced this theory of Count 7 documents in its 2255 motion in the trial court, and the government never denied that this draft-motion prepared by Cueto in 1992 or 1993 was the Count 7 pleading/court paper. In any case, there has never been any dispute about the fact that whatever crime Cueto committed under Count 7, it was before September 13, 1994.

On October 1, 1997, Cueto reported to the federal penitentiary at Springfield, Missouri. He is still in prison.

On July 31, 1998, the Seventh Circuit affirmed Cueto's conviction and sentence. *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998). His Petition for Writ of Certiorari on direct appeal was denied. *Cueto v. U.S.*, 119 S.Ct. 1249 (March 22, 1999).

On November 1, 1999, Cueto filed a Motion for Relief Under 28 U.S.C. 2255. While that motion was pending, this Court decided *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). On July 28, 2000, Cueto filed in the trial court: "Supplemental Memorandum in Support of §2255 Relief Based Upon the Recently Decided U.S. Supreme Court (Decision) of ... *Apprendi v. New Jersey* (citation)." See Appendix at A-128.

On August 18, 2000, Judge Limbaugh denied all of Cueto's pending motions, with an ORDER, and MEMORANDUM OF ORDER, see Appendix A at A-1. Cueto moved for a certificate of appealability (COA). Judge Limbaugh denied the motion with a two-sentence order,

filed January 26, 2001. See Appendix B at A-40. Cueto then petitioned in the Seventh Circuit for a COA. In a one-page order issued on March 15, 2001, the Appeals Court denied the petition, finding "no substantial showing of a denial of a constitutional right". See Appendix C at A-41.

This Petition for Writ of Certiorari presents issues raised in the motion and petition for COA. Your petitioner prays that the Court will grant its Writ on all three of the substantive questions presented, in order to decide the important Fifth and Sixth Amendment issues raised herein under *Apprendi*.

In the first alternative to the above prayer, your petitioner prays that this Court will issue its Writ of Certiorari, vacate the judgment of the Court of Appeals, and remand by summary disposition with instructions to see *Apprendi v. New Jersey*.

In the second alternative, your petitioner prays that the Court will issue its Writ of Certiorari, reverse the judgment of the Court of Appeals, and remand by summary disposition with instructions to grant the certificate of appealability.

REASONS FOR GRANTING WRIT

The threshold question is procedural. Under 28 U.S.C. 2253(c)(2), a federal prisoner must show as predicate to an appeal from the final order under §2255, a "substantial showing of the denial of a constitutional right". See *Hohn v. U.S.*, 118 S.Ct. 1969, 1972 (1998). If the petitioner makes such a showing, he is entitled to a certificate of appealability.

The standard in question is not high. In *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), this Court explained what is meant by the "substantial showing" test:

> "(T)he petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are 'adequate to deserve encouragement to proceed further.'" (Citations omitted.)

Although *Barefoot* was decided before 28 U.S.C. 2253(c)(2) was amended in 1996, this Court has noted that the only change in the statute was Congress' replacement of the word "federal" with the word "constitutional". See *Slack v. Daniel*, 529 U.S. 473 (2000). *Slack* directs that 2253(c) be read to conform with *Barefoot* with due regard for the substitution of the word "constitutional".

Under this generous standard, your petitioner respectfully submits that the *Apprendi* issues raised herein are manifestly "debatable among jurists of reason". Since *Apprendi* was decided last summer, the federal (and state) courts at every level have been flooded with petitions. This Court itself has been regularly issuing summary remands to the Courts of Appeals on *Apprendi* claims. As recently as February 20, 2001, the Court sent nine cases back to the Courts of Appeals, with the same summary order:

> "The judgment is vacated and the case is remanded to the United States Court of Appeals for the (relevant) Circuit for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)."[3]

[3] See *Sallis v. U.S.*, 99-10280, Seventh Circuit; *Robinson v. U.S.*, 00-5233, Seventh Circuit; *Lora v. U.S.*, 00-6354, Fourth Circuit;

(Continued on next page)

Ironically, the Seventh Circuit, which denied the COA of your petitioner at bar on March 15, 2001, had decided *U.S. v. Westmoreland*, 99-1491 and 00-1348, on February 15, 2001. At pp. 13-14 of the *Westmoreland* slip opinion, the Seventh Circuit acknowledged:

> "While we recognize that the Supreme Court's summary remand is not strong or clear precedent, the remand in these cases (from December, 2000) indicates the possible or even likely view of the Court that *Apprendi* does change the traditional interpretation".

Westmoreland was a drug-quantity case, but this Court has summarily remanded *Apprendi* claims for an enhancement for obstruction of justice (one of the "facts" used to increase Cueto's sentence), see *Garcia v. U.S.*, 121 S.Ct. 750 (2001); for an enhancement for using a minor to commit an offense, see *Meais v. U.S.*, 121 S.Ct. 559 (2000); for an enhancement for possession of a firearm during a drug conspiracy, see *Turnbull v. U.S.*, 121 S.Ct. 620 (2000); for an enhancement for possession of a firearm during commission of a drug offense, see *Steyskal v. U.S.*, 121 S.Ct. 852 (2001).

All of these cases show that not only are the *Apprendi* issues raised herein "debatable among jurists of reason", they are *actually being debated*, even as this brief is being written, in federal and state courts throughout the country. There have been literally hundreds of *Apprendi* decisions (many are unpublished) in recent

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(Footnote 3 continued)

Witherspoon v. U.S., 00-6433, Fourth Circuit; *Bayona v. U.S.*, 00-6665, Eleventh Circuit; *Boyd v. U.S.*, 00-6674, Seventh Circuit; *Randle v. U.S.*, 00-6774, Fifth Circuit; *Brown v. U.S.*, 00-6846, Fourth Circuit; *Tapia v. U.S.*, 00-7069, Eleventh Circuit.

months. Space limitations prohibit your petitioner from collecting them. But to illustrate that the very issue presented in the petition at bar is debatable among jurists of reason, please see *U.S. v. Norris*, 2001 WL 95725 (E.D.N.Y. Feb. 1, 2001).

On March 15, 2001, the Seventh Circuit denied the COA at bar because the court said, implicitly, that the *Apprendi* issues were not debatable among jurists of reason. This was four weeks to the day after a different panel of the Seventh Circuit had acknowledged in *Westmoreland*, the fundamental changes wrought by *Apprendi*. It was six weeks after Judge Nickerson of the Eastern District of New York, in deciding *U.S. v. Norris*, had ruled that *Apprendi* prohibits judicial fact-finding to increase a sentence over the base-offense level prescribed in the Sentencing Reform Act.

So clearly there is a present "debate" between the reasonable jurists on the Seventh Circuit panel at bar, and the reasonable jurist Judge Nickerson. In fact there is a present debate in the Seventh Circuit itself, between the panel that decided *Westmoreland*, and the panel that denied Cueto's COA.

Your petitioner respectfully submits that the issues at bar are being hotly debated in federal and state courts all over the United States; that these issues affect thousands - maybe tens of thousands - of litigants.

The first point of law in question is:

I.

IN FEDERAL CRIMINAL CASES, THE "PRESCRIBED STATUTORY MAXIMUM" REFERRED TO IN THE HOLDING OF *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348, 2362-63 (2000), IS FOUND

NOT IN THE STATUTE THAT DEFINES THE CRIME; BUT RATHER, THE PRESCRIBED STATUTORY MAXIMUM IS FOUND IN THE STATUTE 18 U.S.C. 3551, _ET SEQ._, THE SENTENCING REFORM ACT.

The holding of *Apprendi* is found in 120 S.Ct. at 2362-63:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones v. U.S.*, 526 U.S. 227 (1999)]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'"

This holding is based on "constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law'" under the Fifth Amendment, and "the guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury", under the Sixth Amendment. (See 120 S.Ct. at 2355.) With these two fundamental freedoms thus implicated, the *Apprendi* Court gets to the heart of the matter.

> "(T)rial by jury has been understood to require that '*the truth of every accusation*... should afterwards be confirmed by the unanimous suffrage of twelve of (the defendant's) equals and neighbours.'" (Italics in the *Apprendi* opinion.) 120 S.Ct. at 2356.

So the issue at bar turns on the meaning of the term "prescribed statutory maximum" in the holding of *Apprendi*; more specifically, "the prescribed range of penalties to which a criminal defendant is exposed". (*Apprendi*, 120 S.Ct. at 2363, citing *Jones*.) And the Court directed:

> "The relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365.

Since 1984, and certainly since the Court decided *Mistretta v. U.S.*,488 U.S. 361, 109 S.Ct. 649 (1989), the prescribed statutory maximum, the "prescribed range of penalties", is no longer found in the statute that defines the crime; it is found in the provisions of the Sentencing Reform Act. [Although if the maximum sentence provided for in the statute that defines the crime is less than the guideline-computation, then the ceiling for the sentence would be in the statute that establishes the offense. See *Edwards v. U.S.*, 523 U.S. 511, 118 S.Ct. 1475 (1998).]

In *Mistretta*, the Court began its opinion with a bit of history:

> "For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. *Statutes specified the penalties for crimes* but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much". (Italics added.) 109 S.Ct. at 650.

The "statutes" referred to in the above quote were the statutes that defined the given crimes. In enacting these statutes, "Congress delegated almost unfettered discretion to the sentencing judge". 109 S.Ct. at 651. But, "(f)undamental and widespread dissatisfaction with the uncertainties and the disparities", resulted in Congress' enacting "the sweeping reforms that are at issue here." Id at 651. This set of "sweeping reforms" was the Sentencing Reform Act, which provided for "a mandatory-guideline system". Id at 652.

Although Justice Scalia dissented in *Mistretta* on the ground that the Act violated the doctrine of separation of powers, there was no disagreement between him and the majority on the meaning of the Act:

> "While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines', see (citation), they have the force and effect of laws, *prescribing the sentences* criminal defendants are to receive. A judge who disregards them will be reversed, (citation)." Italics added. Id at 676.

The semantical parallels between *Mistretta* and *Apprendi*, particularly Justice Scalia's use of the word "prescribe", and Justice Stevens' use of the same verb in the holding of *Apprendi*, indicate that the Court views the Guidelines as a statutory hierarchy of punishment, which regulates grades or maximum penalties that cannot be increased by an assessment of "facts", unless those facts are proved to a jury beyond a reasonable doubt. One does not have to speculate on this matter, for the *Mistretta* Court says that "Congress *prescribed the specific tool* - the guideline system - for the Commission to use in *regulating* sentencing." (Italics added. This

time the *Mistretta* majority used the word "prescribed".) 109 S.Ct. at 656. Congress, through the Commission, established "grades or *maximum penalties*" (italics added), which only Congress could modify. Id at 653. And then the *Mistretta* Court said:

> "In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality *it legislated a full hierarchy of punishment*". Italics added. 109 S.Ct. at 657.

If there is any doubt left after the majority opinion in *Mistretta*, that doubt is dispelled by Justice Scalia's pointed description of the Commission as a "sort of junior varsity Congress". Id at 683. This junior varsity Congress is: "To exercise no governmental power other than the making of laws", and those laws are "*(s)tatutorily permissible sentences* for particular crimes". Italics added. Id at 672.

Based on the teachings referred to above, it is clear that the prescribed statutory maximum sentence for each individual defendant in federal criminal cases, is no longer found in the statute that defines the crime. After the "sweeping reforms" of the Sentencing Reform Act, the maximum for each defendant is measured according to the prescribed sentence in the relevant section of 18 U.S.C. §3551, *et seq.*

When *Mistretta* is read in conjunction with *Apprendi*, the conclusion is apparent: Any "fact" which increases the penalty beyond the statutory maximum prescribed in the base-offense level of the Sentencing Reform Act, must be submitted to the jury for proof beyond a reasonable doubt. Put another way, when a jury - such as the jury in the case at bar - finds a defendant guilty of a given crime based on the given set of "facts" which are

submitted to it at trial, those "facts" authorize the judge to impose a certain "range of punishment", with a certain maximum sentence. This range is calculated according to the individual factors provided for in the Act. In the case at bar, that was the base-offense level of 12, authorized by the facts submitted to the jury at trial; the maximum sentence for which was 16 months imprisonment.

Apprendi must also be read in light of its harbinger, *Jones v. U.S.*, 526 U.S. 277, 119 S.Ct. 115 (1999). In fact the holding in *Apprendi*, incorporates an endorsement of the "statement of the rule set forth in the concurring opinions in (the *Jones*) case". 120 S.Ct. at 2363.

Jones was convicted of violating the federal carjacking statute, which prescribed a maximum penalty of 15 years, unless there was serious bodily injury. If there was, then the sentence could go to 25 years. In *Jones*, the trial judge found that one of the victims had sustained a perforated eardrum during the crime, and so sentenced Jones to the maximum prescribed in the statute - 25 years.

But this Court found that the prescribed statutory maximum authorized by the jury verdict was 15 years. In order to allow a sentence of 25 years, the "fact" of great bodily harm should have been charged in the indictment and proved beyond a reasonable doubt to a jury.

Jones found that there were separate offenses of carjacking, each with distinct elements, elements that had to be "charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones*, 526 U.S. at 252. In the case at bar, there were different kinds of obstruction of justice. It is

appropriate to repeat the *Apprendi* directive that the "relevant inquiry is not one of form, but of effect". The "effect" of Judge Limbaugh's factual findings was that Cueto was exposed to a sentence that was nearly six years longer than that authorized by the jury's verdict.

What happened in *Jones*, and *Apprendi*, is really no different than what happened in the case at bar. Cueto's sentence of 87 months required findings that included "facts" such as "involvement" of high public officials. Indeed, based on this fact alone, Cueto's sentence was enhanced 8 levels, approximately 48 months of additional imprisonment. Your petitioner respectfully submits that if an accused is going to be sentenced to four years, surely the factual allegation upon which the sentence rests, must be proved beyond a reasonable doubt to the jury.

Justice O'Connor's dissent is the final proof that the rule of *Apprendi* applies to the Guidelines:

> "The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme...(and) its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades." 120 S.Ct. at 2393-94.
>
> "Finally, perhaps the most significant impact of the Court's decision will be a practical one - its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional, but

> *its reasoning certainly suggests that they are not.* Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today." (Italics added.) 120 S.Ct. at 2394.

Judge Limbaugh's assessment of seven post-verdict facts increased petitioner-Cueto's sentence from the maximum 16-months prescribed in the Sentencing Reform Act, to a sentence of 87 months in prison. The case at bar is just one of thousands - maybe tens of thousands - in which people have been locked in penitentiaries and jails and prisons on the basis of factual allegations that were summarily decided by "a single employee of the State" (Justice Scalia's term for judges, see *Apprendi*, 120 S.Ct. at 2367).

Your petitioner prays that the Court will grant Certiorari, and direct further briefing and argument on this question, or in the alternative vacate the judgment of the Court of Appeals and summarily remand with instructions to see *Apprendi*. In the second alternative, your petitioner prays that the judgment of the Seventh Circuit be reversed and the case summarily remanded with instructions to issue the COA.

II

IN FEDERAL CRIMINAL CASES, EVEN IF THE "PRESCRIBED STATUTORY MAXIMUM" IS IN THE STATUTE THAT DEFINES THE CRIME, THE RULE IN *APPRENDI* OPERATES TO PROHIBIT A JUDGE FROM INCREASING THE SENTENCE BEYOND THAT MAXIMUM, BASED ON POST-

VERDICT FINDINGS OF FACT THAT ARE DETERMINED BY THE JUDGE, NOT THE JURY, AND THAT ARE NOT PROVED BEYOND A REASONABLE DOUBT.

There has never been any dispute about the fact that each act that constituted the crime in Count 2 (see Appendix J at A-119), Count 6 (see Appendix K at A-124), and Count 7 (whatever the false pleadings and court papers were), was committed before September 13, 1994. Before that date, the maximum sentence provided for in 18 U.S.C. 1503 was five years in prison and a $5,000 fine. So even if, for the sake of argument on this point, we assume that the prescribed statutory maximum was in 18 U.S.C. 1503, Judge Limbaugh still exceeded that maximum by sentencing Cueto to 27 extra months of imprisonment and $15,000 in additional fines under each of Counts 2, 6 and 7. The Judge also increased the maximum fine permitted in 18 U.S.C. 371 - which was Count 1 - by $10,000. The Judge purported to base the sentence he imposed on a guideline-computation. But the real reason for the sentence in excess of the maximum, even if the maximum was in 18 U.S.C. 371 and 1503, was the Judge's finding of the "fact" that Cueto had abused the First Amendment and had treated it with license. The Judge bolted on an additional 27 months of imprisonment and at least $55,000 in fines, because Cueto's editorial opinions in the *East Side Review* "maligned the integrity and reputations of several Assistant United States Attorneys". See Appendix E at A-67. The Judge did not even attempt to incorporate this factual finding into a guideline-computation.

There is also no doubt that Cueto's abuse of the First Amendment was his articles and editorials in the *East*

Side Review. Judge Limbaugh told us so himself. See Appendix E at A-67.

Respectfully, your petitioner asserts that no matter how offensive Cueto's newspaper was to government prosecutors and to Judge Limbaugh; the rule in *Apprendi* operates to prohibit this post-verdict assessment of fact from increasing Cueto's imprisonment and fine beyond the maximum prescribed, even if that maximum is in the statute that defines the crime.

Your petitioner prays that the Court will grant its Writ of Certiorari, and direct further briefing and argument on the point that the holding of *Apprendi* applies in federal criminal cases, even if the prescribed statutory maximum is in the statute that defines the crime; or in the alternative vacate the sentence and summarily remand with instructions to see *Apprendi v. New Jersey*; or in the second alternative reverse the judgment of the Seventh Circuit, and summarily remand the case with instructions to issue the COA.

III

IF A PRISONER'S DIRECT APPEAL WAS EXHAUSTED PRIOR TO THIS COURT'S OPINION IN *APPRENDI*, THAT PRISONER'S MOTION FOR RELIEF UNDER 28 U.S.C. 2255 IS NOT PROCEDURALLY BARRED UNDER *U.S. V. FRADY*, 456 U.S. 152 (1982).

This third issue concerns the familiar "cause and prejudice" rule of *U.S. v. Frady*, 456 U.S. 152 (1982). The Seventh Circuit has held in *Garrott v. U.S.*, 238 F.3d 903 (7th Cir. 2001); and *U.S. v. Smith*, 2001 WL 111590, 99-4253; that *Frady* bars prisoners from obtaining *Apprendi* relief on §2255 motions. It must be

noted that the panel which denied the COA at bar, did not mention *Frady*, although Judge Limbaugh denied Cueto's *Apprendi* claim on the ground that it should have been raised on direct appeal. See Appendix A at A-1. (Cueto's direct appeal died on March 22, 1999, when this Court denied his Petition for Writ of Certiorari. *Apprendi* was decided in June 2000.)

Your petitioner prays that the Court will grant Certiorari to resolve this issue. There may be thousands of prisoners in the jurisdiction of the Seventh Circuit alone (federal and state prisoners convicted or held in the states of Illinois, Indiana or Wisconsin) who are being denied *Apprendi* relief that they would otherwise be entitled to, but for the Seventh Circuit's erroneous application of *Frady* to *Apprendi*.

Convicted defendants are supposed to raise all the points alleging error in the direct appeal. The defendant procedurally defaults on those issues he failed to raise. Thus the "cause" rule of *Frady*.

But the defendant is excused in certain circumstances, among which is the case where the Supreme Court delivers an opinion which overturns "a longstanding and widespread practice to which (the) Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Reed v. Ross*, 468 U.S. 1, 17 (1982).

That *Apprendi* is just such a decision, seems beyond question. Every federal court in the country had been imposing and sustaining increased sentences beyond the statutory maximum, based on so-called sentencing factors, which were (and are) really nothing more than judge-determined "facts", not submitted to a jury nor proved beyond a reasonable doubt. Many state courts -

such as New Jersey in the *Apprendi* case - have been doing the same thing. *Apprendi* is a watershed rule, which changes the sentencing landscape, for the greater betterment of us all. People in America should not be subjected to prison time, based on factual determinations made by a judge, without a jury, without proof beyond a reasonable doubt. As *Apprendi* teaches, that's what the application of Fifth (and Fourteenth) Amendment due process means when analyzed in connection with the Sixth Amendment right to trial by jury. Justice Scalia's concurrence eloquently reminds: "(T)he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." 120 S.Ct. at 2367.

Indeed, once again, to erase any doubt on this question, one need only look to Justice O'Connor's dissent. The Court's *Apprendi* opinion is a "watershed change in constitutional law". 120 S.Ct. at 2380. It is a "bold stroke". The "rule (the Court) announced" is the first time "in the over two hundred years since the ratification of the Bill of Rights", that the Court has recognized such a right. 120 S.Ct. at 2381. Cueto did not procedurally default.

Cueto's *Apprendi* claim also satisfies the "prejudice" prong under *Frady*. If *Apprendi* would have been decided before Cueto was sentenced, his prison time and fine would have been years, and tens of thousands of dollars, less. And moreover, the rule in *Apprendi* exposes a constitutional, structural defect in Cueto's case. *Apprendi's* application of Fifth (or Fourteenth) Amendment due process, onto the Sixth Amendment right to a jury trial, is congruent with the Court's analysis in *Cage v. Louisiana*, 498 U.S. 39 (1990); and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Structural constitutional error is always prejudicial.

Your petitioner has satisfied both the cause and prejudice requirement of *Frady*. This issue too, could not be more ripe for review by the Court. Every prisoner - federal and state - who is presently incarcerated because a judge found "facts" which increased the prescribed statutory maximum sentence, and whose direct appeal has been exhausted, awaits the next *Apprendi* ruling from this Court.

CONCLUSION

Your petitioner presents three questions for review, issues which are roiling in the trial and appellate courts, federal and state, throughout the country. Your petitioner prays that the Court will grant Certiorari: and will order briefing and argument on all three of the substantive questions presented; or order that the judgment of the Court of Appeals be vacated and the case be summarily remanded with instructions to see *Apprendi v. New Jersey*; or order that the judgment be reversed, and the case be summarily remanded with instructions to issue the certificate of appealability.

Respectfully submitted,

CHRISTOPHER CUETO - #06192248
(Counsel of Record)
7110 West Main Street
Belleville, Illinois 62223
Phone: (618)277-1554
Fax: (618) 277-0962

Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
UNITED STATES OF AMERICA,
Plaintiff,
vs.
AMIEL CUETO,
Defendant.

Case No. 99-831 SNL
Criminal No. 96-30070-SNL
[Filed: August 18, 2000]

ORDER

IT IS HEREBY ORDERED that pursuant to the Court's Memorandum, defendant's motion for relief under 28 U.S.C. § 2255 is **DENIED**.

IT IS FURTHER ORDERED that defendant's motion to conduct discovery pursuant to Rule 6 of the Federal Rules governing § 2255 cases is **DENIED**.

IT IS FURTHER ORDERED that defendant's request for leave of Court for document production under Rule 6 of § 2255 rules is **DENIED.**

IT IS FINALLY ORDERED that supplemental motion of defendant to conduct limited discovery pursuant to Rule 6(a) involving the taking of the deposition of Ms. Mary Robinson and to file four interrogatories is **DENIED.**

Dated this 18th day of August, 2000.

/s/ Stephen N. Limbaugh
Stephen N. Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
UNITED STATES OF AMERICA,
Plaintiff,
vs.
AMIEL CUETO,
Defendant.

Case No. 99-831 SNL
Criminal No. 96-30070-SNL
[Filed: August 18, 2000]

MEMORANDUM AND ORDER

As suggested in the Court's Memorandum and Order of January 24, 2000, this matter is before the Court on defendant Cueto's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. The government has responded, and the defendant has replied to the response. The Court entertained oral argument in support of and in opposition to the request for relief.

After an extended jury trial, the defendant was found guilty of Count 1, Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371, Counts 2, 6 and 7, Obstruction of Justice in Violation of 18 U.S.C. § 1503 and defendant was found not guilty as to Counts 3 and 4, additional obstruction of justice counts, and Count 8, Conspiracy to Obstruct Justice.

On September 19, 1997, the defendant was sentenced to 60 months on Count 1 and 87 months on each of Counts 2, 6 and 7 with all sentences to run concurrently.

The verdict and sentence were affirmed on appeal. *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998). The United

States Supreme Court denied defendant's petition for a writ of certiorari. *U.S. v. Cueto*, 119 S.Ct. 1249, 143 L.Ed.2d 347 (1999). Thereafter, defendant's § 2255 motion was timely filed.

Under the provisions of 28 U.S.C. § 2255, if the Court finds that the judgment was rendered without jurisdiction, or the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of a defendant as to render the judgment vulnerable to collateral attack, the Court shall vacate and set the judgment aside and shall discharge the defendant or resentence him, or grant a new trial or correct the sentence as may appear appropriate. The burden is on the defendant to establish a basis for relief under § 2255. *U.S. v. Trumblay*, 234 F.2d 273, 275 (7th Cir. 1956), *cert. denied*, 77 S.Ct. 233, 352 U.S. 931, 1 L.Ed.2d 166. The Court finds that defendant has not sustained his burden.

There are six points raised in defendant's § 2255 motion:

Point 1

The government's failure to produce a letter from the U.S. Attorney to the Administrator of the Illinois Attorney Registration and Disciplinary Commission constitute a *Brady* violation and compelled the defendant to bear witness against himself in violation of the Fifth Amendment of the United States Constitution.

The letter is set out as follows:

U.S. Department of Justice
United States Attorney
Southern District of Illinois
Nine Executive Drive, Suite 300
(618) 628-3700
Fairview Heights, IL 62208

May 2, 1995

Ms. Mary Robinson
Administrator
Attorney Registration
Disciplinary Commission
One Prudential Plaza
130 East Randolph Drive, Suite 1500
Chicago, IL 60601
Re: Attorney Amiel Cueto

Dear Ms. Robinson:

Please be advised that during the course of a year-long grand jury investigation into video gambling, racketeering, public corruption and tax violations, recently a cooperating witness for the government has submitted a proffer and subsequent testimony including allegations of attorney misconduct and criminal violations on the part of the above-referenced licensed attorney at law. This letter and enclosures are submitted to the Commission pursuant to our ethical obligation.

Enclosed herewith is the statement of facts accompanying the plea of guilty of Mayor Sylvester Jackson, mayor of Washington Park, Illinois, which is a matter of public record. The testimony given by Mayor Jackson

was before the federal grand jury and is therefore confidential.

In addition, enclosed is a copy of the Seventh Circuit Court of Appeals opinion previously issued, which is pertinent to any inquiry as background and verification for one of the occurrences alleged in the Statement of Facts.

Also enclosed are copies of pertinent editions of the by-monthly newspaper, the East Side Review, which is published by a corporation established by Mr. Cueto and which has been published every two weeks since the Seventh Circuit Court of Appeals pronoucement. These copies contain statements believed to be written by Mr. Cueto, which pertain to the matter at hand.

Concerning any investigation, our office would prefer that any investigation you may begin be placed on hold after your responsive statement is received from the subject. In the event this is problematic, please do not hesitate to call either myself or the United States Attorney Criminal Division Chief, Michael Carr, to discuss this aspect.

Thank you.

Very truly yours,

W. CHARLES GRACE
United States Attorney

WCG:cmr
Enclosures

A week later, on May 9, 1995, Hon. William D. Stiehl also sent a letter involving the defendant to the Attorney Registration and Disciplinary Commission. That letter is set out as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS 62202
Chambers of
WILLIAM D. STIEHL
Judge

9 May 1995

David M. Harrigan
Chairman
Attorney Registration and
Disciplinary Commission
345 1st American Center
Springfield, Illinois 62071
Re: Amiel Cueto

Dear Mr. Harrigan:

Enclosed please find a copy of a Stipulation of Fact filed in the cases of *United States v. Sylvester Jackson, et al.*, Criminal No. 94-30128-01 WDS, and *United States v. B & H Vending, et al.*, Criminal No. 95-30024-WDS, in connection with the plea of defendant Sylvester Jackson taken on April 25, 1995.

Inasmuch as this stipulation makes statements, which, if true, might constitute criminal, as well as unethical, conduct on the part of Attorney Amiel Cueto, of Belleville, Illinois, I believe I am obliged to bring this to the attention of the Attorney Registration and Disciplinary Commission.

Very truly yours,

WILLIAM D. STIEHL

WDS:jb
Enclosure

The May 2nd letter was addressed to the Chicago office of the Attorney Registration and Disciplinary Commission and was received May 10, 1995. Judge Stiehl's letter was addressed to the Springfield, Illinois office of the Attorney Registration and Disciplinary Commission and was received May 11, 1995.

On May 19, 1995 counsel for the Commission wrote defendant a letter from the Chicago office. The reference was "Amiel S. Cueto in relation to Hon. William D. Stiehl, et al., No. 95-CI- 2378." The letter advised defendant "We have received the enclosed communication from Judge William Stiehl." which was Judge Stiehl's May 9th letter. The Commission letter to the defendant stated that stipulation of fact entered in connection with the guilty plea of defendant Sylvester Jackson in *U.S. v. Jackson* and *U.S. v. B & H Vending, et al.*, contained allegations concerning defendant's conduct which, if true, constituted ethical misconduct and could violate Illinois law. The letter then sets out 13 violations. The letter then asks the defendant to respond to the allegations addressing certain issues raised in the 13 incidents referred to in the letter.

The stipulation of fact referred to in the U.S. Attorney's letter and the letter from Judge Stiehl are the same, and are a part of the file in each of the two criminal cases referred to in Judge Stiehl's letter.

Defendant replied with a 42 page letter to the request of the Commission in response to Judge Stiehl's notification. At the time of trial, the government listed the 42 page reply as government exhibit 40, and after objection by defendant, this Court redacted most of the exhibit and only allowed a few paragraphs in evidence. The portion of the 42 page reply received in evidence as exhibit 40 is set out as follows:

Ms. Sari J. Weissman
May 30, 1995
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. . . How dare you accuse me of having a role in a criminal conspiracy. You're part of the most corrupt organization in the Illinois state government. When I take your deposition in *Cueto v. O'Malley*, you're going to have a lot of explaining to do. And you better not tell one single lie. In fact you'd better give that same advise to Ms. Robinson, Ms. Zimbrakos, Mr. Siner, and the other reprobates in your office. See, if any of you do lie, you'll be committing perjury in the St. Clair County Circuit Court. (You might be physically in Chicago, but your testimony will be given for the St. Clair County court.) You'll be engaging in a criminal conspiracy to commit official misconduct by lying to that court with venue lying here in St. Clair County. In December 1996, long before the statute of limitations runs, I'll be State's Attorney in St. Clair County. Other prosecutors might have overlooked the massive crimes committed by people in your office in the past. (Ask Ms. Zimbrakos and Ms. Robinson about the time they tried to put in the fix with Judge Kardis in Madison County.) But please rest assured that I won't. I hope we understand each other. Now to the merits of your inquiry.

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P.P.P.P.S. I hope you don't think I'm kidding about anything I've written in this letter.

Ms. Sari J. Weissman
May 30, 1995
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But I will add that I've never been partners with Tom Venezia, although in 1993 and 1994 I bought stock in two separate corporations in which Venezia also bought stock. These corporations were both legally organized businesses that had nothing to do with B & H Vending or with the lease of any vending machines or video poker computer games.

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I told Venezia that at the meeting with Robinson which was going to take place on August 17, he (Venezia) should embellish and exaggerate some, in order to see whether Robinson would overtly attempt to extort a bribe.

Present counsel for defendant stated on page 8 of defendant's reply that the letter from the U.S. Attorney in question was only found by review of the Disciplinary Commission's § 2255 motion filed November 1, 1999.

Nonetheless, reference to the U.S. Attorney's letter occurred during the trial of the defendant in late spring and early summer of 1997. James Grogan, Chief Counsel for the Attorney Registration and Disciplinary Commission for the State of Illinois, testified for the government as an expert in legal ethics. As to the investigation of the defendant by the Commission, Grogan stated that the United States Attorney first contacted the Administrator of the Commission. During the trial, Grogan testified that:

> "My recollection is that he (U.S. Attorney) wrote us to inform us about certain information that had come to his attention and asked us to stay any formal proceedings until the conclusion of any proceedings." Trial Tr., Vol. 22, P. 120.

Later in his testimony, Grogan stated that the U.S. Attorney was sending information to the Commission (Tr. Tr., Vol. 22, P. 201) and that the investigation of the Commission was on hold at the time of the testimony in part because of the request of the U. S. Attorney's office. Trial Tr., Vol 23, P. 16.

Grogan also testified that he was not personally involved in the investigation of defendant, and that he did not rely on any of the information that came from the United States Attorney in forming his opinions concerning his testimony at the time of trial. Trial Tr., Vol. 22, P. 120, 121.

Grogan also testified that the investigation by the Commission of the defendant was started by the letter from Judge Stiehl of May 10th rather than the letter of May 2nd from the U.S. Attorney. Trial Tr., Vol. 22, P. 187.

Defendant asserts that the letter to the Commission from the United States Attorney constituted *Brady* evidence, and should have been made available to the defendant before or during trial. The assertion is that had the defendant been in possession of a copy of the letter, he would have responded differently, or not at all, to the request of the Commission investigating him and that he would have conducted his defense in a different way so that the outcome conceivably would have been different. As a result of lack of knowledge of the letter, defendant insists that he made damaging statements to

the Commission and, in effect, was required unwittingly to testify again himself when at least some of that evidence was inappropriately made available to the jury as prosecution evidence. Defendant suggests that disclosure of the letter would have rendered inadmissible not only Government Exhibit 40, the redacted portion of which was received in evidence, but also virtually all of the evidence the government introduced against the defendant. Defendant states that the disclosure would have also allowed defendant to impeach the testimony of James Grogan when he was called as a government witness.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Impeachment evidence also falls within the scope of the *Brady* rule. *U.S. v. Bagley*, 473 U.S. 667, 676, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Under *Brady*, in order to succeed with a claim a defendant must establish that (1) the prosecution suppressed or withheld evidence that (2) was favorable and (3) material to the defense. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194, *Grivens v. Roth*, 172 F.3d 991, 996 (7th Cir. 1999).

The Court in *Grivens* set out succinctly the standard to be followed here. *See Grivens*, 172 F.3d at 996 as follows:

> "Within this context, prosecutors have an affirmative duty to disclose such evidence and a duty to

'learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' *Kyles v. Whitley*, 514 U.S. 419, 432, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). This duty arises when 'the cumulative effect of all such evidence suppressed by the government . . . raises a reasonable probability that its disclosure would have produced a different result.' *Id.* At 421-22, 115 S.Ct. 1555. In determining whether a reasonable probability exists, courts must focus on whether the lack of evidence impaired the defendant's ability to receive a fair trial or cast doubt upon the verdict. 'A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' *Id.* At 434, 115 S.Ct. 1555 (quoting Bagley, 473 U.S. at 678, 105 S.Ct. 3375). Prosecutors may not simply claim ignorance of *Brady* material. *See Young*, 20 F.3d at 764. Nor may defendants cry foul if they, through a reasonable exercise of diligence, would have been able to obtain the evidence themselves. *997 *See United States v. Dimas*, 3 F.3d 1015, 1018-19 (7th Cir. 1993)."

There is no evidence to show that the United States Attorney's letter to the Illinois Attorney Registration and Disciplinary Commission of May 2, 1995 was revealed to defendant. As the letter was from the U.S. Attorney, obviously, it was known to the government. At issue is whether the letter was material to the defense and the Court believes that it was not. First, the content of that letter and the letter sent by Judge Stiehl to the Commission was the same. Copy of the Stiehl letter was timely furnished to the defendant.

Each letter had attached a stipulation of fact in two pending criminal cases before Judge Stiehl involving a plea of one Sylvester Jackson taken on April 25, 1995. As pointed out in both letters, the material in the stipulation could constitute criminal as well as unethical conduct on the part of defendant.

The U.S. Attorney's letter also attached copy of the Seventh Circuit Court of Appeals' opinion previously issued which was pertinent to the stipulation referred to. The Court of Appeals' opinion is a matter of public record and available to all parties.

Copies of a bi-monthly newspaper called the "East Side Review" were also attached to the U.S. Attorney's letter. These publications were also available to the public.

The only difference between the two letters is that one was written by a U.S. District Judge and the other by a U. S. Attorney, and the letter from the U.S. Attorney requested that the Commission place any investigation that might begin "on hold after your responsive statement is received from the subject. Accordingly, as the defendant had copy of Judge Stiehl's letter, the only information that defendant did not have was that the U.S. Attorney had written a similar letter and requested that any possible investigation by the Commission be postponed until the defendant had replied to any request of the Commission.

When the defendant received a copy of Judge Stiehl's letter, he was immediately placed on notice that Judge Stiehl had reported information about his possible wrong doing to the Commission accompanied by documentation, and was quite aware from the comments in Judge Stiehl's letter that he suggests there could be criminal

as well as unethical conduct on the part of defendant. The Court does not attach the significance that defendant does to the request by the U.S. Attorney to place any possible investigation of the defendant by the Commission on hold. Defendant knew that the Commission would probably be investigating his conduct because of the receipt of Judge Stiehl's letter. The fact that defendant did not have the same information given by the U.S. Attorney to the Commission is not material.

The undersigned tried this case, and cannot conceive that defendant was prejudiced in any way by not having copy of the U.S. Attorney's letter. He cannot successfully urge that he was forced to testify against himself by replying to the questionnaire of the Commission on receipt of Judge Stiehl's letter. The Commission indicated in the request to the defendant that the request was being made because of the notification by Judge Stiehl. That request for information would have come forward whether or not the Commission received the U.S. Attorney's letter. Thus, the Court finds that it was Judge Stiehl's notification that prompted the inquiry and not that of the U.S. Attorney. There is no credible evidence to suggest otherwise.

Defendant cites several Illinois state cases commenting on the rights of attorneys when being investigated by the Illinois Disciplinary Commission for possible misconduct and concern about self incrimination when required to respond to the Commission's inquiry. These cases are not relevant as the Court has decided that it was Judge Stiehl's notification that prompted the Commission's inquiry as to defendant's misconduct, and not the letter from the United States Attorney. If defendant confessed as he suggested he did in his 42-page response to the Commission in Exhibit 40

unredacted, this Court is unable to discern the response was a confession. Only a small portion of Exhibit 40 was shown to the jury in any event, and that unredacted portion was certainly not a confession; nor is there any credible evidence to suggest the unredacted portion of Exhibit 40 played any major part in the government's presentation of its case. There certainly is no reasonable probability to suggest, as defendant surmises, that the testimony of Grogan and FBI Agent Reginald Joseph was shaped directly or indirectly by defendant's 42-page reply to the Commission. In fact, Grogan testified that he did not rely on defendant's letter in his opinion testimony before the jury. Trial Tr. Vol. 22 at p. 182 and p. 183 to 185; nor did he rely on the letter from the U.S. Attorney to the Commission . Trial Tr. Vol 22 at p. 120.

The Court further finds that there is no reasonable probability that the disclosure of the U.S. Attorney's letter to defendant would have produced a different result in the jury trial of defendant. The Court finds that its suppression did not impair the defendant's ability to receive a fair trial, nor did it cast a doubt on the verdict. Failure to disclose the letter did not undermine confidence in the outcome of the trail. *See Grivens*, 172 F.3d at 996. "There is never a real 'Brady violation' unless nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *U.S. v. Colon*, 2000 W.L. 369685 (N.D. Ill., April 7, 2000).

While prosecutors may not simply claim ignorance of *Brady* material, as stated in *Grivens*, defendants may not cry foul if they, through a reasonable exercise of diligence, would have been able to obtain the evidence themselves. *Grivens*, 172 F.3d at 996. *U.S. v. Morris*, 80 F3d 1151, 1169 (7th Cir. 1966).

At trial, James Grogan testified that the U.S. Attorney wrote the Commission to inform the Commission about certain information that had come to the attention of the U.S. Attorney about defendant's possible misconduct; thus, the defendant knew at the time that the U.S. Attorney had written a letter to the Commission about defendant. Assuming the government had the obligation to reveal that letter to the defendant, certainly trial counsel should have realized that he did not have a copy of the letter. It is very common during the trial of cases when this type of testimony ensues that counsel will request a sidebar and simply state, on the record out of the hearing of the jury, that he does not have a copy of the letter the witness referred to and ask that the government produce a copy as it could be *Brady* material. Absent unusual circumstances, the Court would have almost always granted that request or at least examined the letter *in camera* to determine if, in fact, it could constitute *Brady* material. While this omission on the part of defendant, who is an attorney, and his counsel, does not excuse the government because of its non-production, it does put the defendant on notice that the letter existed and the Court believes that at that point the defendant had a duty to request the information.

The Court finds that, in addition, this issue should have been raised during the regular appeal. Given defendant's present counsel's statement that he did not see a copy of the letter of the United States Attorney until the summer of 1999, well after the appeal had been completed, appeal counsel had copy of the transcript and was certainly aware as the appeal was being implemented that the letter was in existence. It was a point that should have been raised by appellate counsel but

was not. *See U.S. v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

Throughout defendant's memorandum in support of his motion, and his reply to the government's response to the motion, much is made of the suggested bad motive on the part of the U.S. Attorney in withholding the letter written to the Commission. Defendant suggests that there is some type of conspiracy between the United States Attorney and the members of the Commission and conceivably even Judge Stiehl and others to persecute the defendant. The Court finds no evidence of this and there is nothing in the withholding of the U.S. Attorney's letter to the Commission to support such unfounded assumptions. The good faith or bad faith of the prosecution is not relevant. *See Brady,* 373 U.S. at 87. *Kyles v. Whitley*, 514 U.S. at 431.

The syllogistic reasoning of defendant that if he had had copy of the letter from the U.S. Attorney to the Commission, the Court would not have allowed major evidence to come in, and the result of the trial would have been different is simply unfounded. There is nothing in the court record to suggest that the defendant did not receive a fair trial nor was doubt cast upon the verdict because the defendant did not have during trial the bit of evidence complained of. Defendant had copy of Judge Stiehl's letter; he knew he was subject to investigation, not only for unethical conduct, but for possible criminal wrongdoing. He was required to respond to the Commission's inquiry because of the notification to the Commission by Judge Stiehl. Having copy of the U.S. Attorney's letter to the Commission in the defendant's hands would have made no difference. There was no *Brady* violation.

Point 2

The introduction of testimony which the government knew was perjured could have affected the judgment of the jury and on this basis alone, a new trial is required.

Defendant argues that James Grogan gave perjured testimony at trial and that the government knew the testimony was false at the time. Again, this claim is based upon supposition and rank speculation and is unsupported by the evidence.

Throughout his testimony, Grogan stated that the Commission was investigating defendant in response to the notification of Judge Stiehl. Grogan also stated that the U.S. Attorney had written the Commission about certain information that had come to his attention involving defendant and that the Commission had been requested to stay any formal proceedings until a later time.

Without any supporting evidence, defendant insists that Grogan perjured himself when he well knew the investigation by the Commission of defendant was prompted by the letter from the U.S. Attorney rather than the notification of Judge Stiehl. All of the evidence is to the contrary. Grogan stated that the Commission had received information about defendant's purported wrong doing from both Judge Stiehl and the U.S. Attorney, but that the Stiehl letter was the impetus for the inquiry.

Defendant suggests if he had possessed a copy of the U.S. Attorney's letter to the Commission at trial, his counsel could have subjected Grogan to "a withering cross-examination" and he was unable to do so because

he did not have the letter. Trial counsel for defendant could have subjected Grogan to "a withering cross-examination" without actually possessing the letter. He could have forcefully asked Grogan to cross-examination as assortment of questions about the letter Grogan stated the Commission received from the U.S. Attorney as well as the one sent by Judge Stiehl.

In any event, defendant has not sustained his burden and there is no credible evidence from which this Court could find that the testimony of James Grogan was false. There is no evidence that there was perjured testimony and that the prosecution made knowing use of it. *Schaff v. Snyder*, 190 F.3d 513, 529, 530 (7th Cir. 1999).

Defendant is also procedurally barred here as he did not raise the issue on appeal. He was aware of the letter during trial as recounted in Point 1 but choose to ignore the alleged withholding by the United States. He has failed to show "cause" under the requirements of *U.S. v. Frady*, 456 U.S. at 166. *Schaff v. Snyder*, 190 F.3d 513, 527 (7th Cir. 1999).

Point 3

Previously disclosed evidence reveals that the undersigned, who presided over the trial, was biased or that there was an appearance of Rule 11 impropriety requiring a new trial.

A. The undersigned in violation of the Bright-Line Prohibition contained in Rule 11 of the Federal Rules of Criminal Procedure was involved in the plea negotiations between the government and Robert Romanik or approved of a plea which resulted in a fundamental miscarriage of justice.

Robert Romanik was also a defendant in this case and, on March 3, 1997, Romanik entered a plea of guilty to Count 5 of the indictment which was an obstruction of justice count in violation of 18 U.S.C. § 1503. Defendant Cueto was not charged in Count 5.

The trial of defendant began April 7, 1997 and the case was submitted to the jury June 10, 1997, and the verdict was returned the next day, June 11, 1997.

On July 18, 1997 Romanik was sentenced to twelve months probation, six months of which was home detention and a $80,000 fine. Defendant Cueto was sentenced September 19, 1997.

At a later time, a petition was filed alleging that Romanik had violated certain conditions of his probation with a request that probation be revoked. The undersigned conducted an open hearing on this request on January 25, 1999 and found that Romanik had violated certain conditions of probation and he was resentenced. During the resentencing, this Court set out certain reasons for imposing the new sentence as follows:

> "Let me give my reasons for making this decision. At the time that I accepted the plea agreement – at this stage I do not think I'm remiss in saying, and I made no excuses for this, it was against my better judgment. There was considerable discussion among counsel and with me about the plea bargaining in this matter. I finally determined that it would be appropriate to accept the result of the plea bargaining, and having accepted that I did make the determination pursuant to the agreement of the parties, that is both the defendant and the government, to find that there was a total offense level of ten, a

> criminal history category of one. I feel that in a resentencing because of a probation violation it would be inappropriate for me to deviate from my part of the bargain. I agreed to what the range of punishment should be, I sentenced the defendant within that range and I think it would be inappropriate for me to change that range."

The plea, and sentence, of Romanik and probation violation hearing and the trial and sentencing of defendant Cueto were all highly publicized. Defendant Cueto asserts that he should have a new trial or other relief pursuant to § 2255 because of the asserted violation by this Court of Rule 11 of the Federal Rules of Criminal Procedure. The assertion is that the Court violated Rule 11 by engaging in the plea negotiations between the government and Romanik and that this is indicative of bias of this Court as to defendant Cueto.

Some provisions of Rule 11 are pertinent in the consideration of defendant's position.

"The Court shall not participate in any discussions between the parties concerning any such plea agreement." Rule 11(e)(C).

> "If a plea agreement has been reached by the parties, the Court shall, on the record, require the disclosure of the agreement in open Court, or, on a showing of good cause, in camera, at the time the plea is offered." Rule 11(e)(2).

The Court finds that there was no violation of Rule 11 in the taking of the plea of defendant Romanik. It is quite common in cases involving multiple defendants that a plea of one or more of the defendants is taken *in camera* and the record is placed under seal. As stated,

Rule 11 provides for that very procedure. It would undermine the purpose of the rule to vacate what was done *in camera* and make it available to the public. It would be gross speculation to suggest the reasons for the *in camera* hearing or the sealing of the record. The Court, therefore, did not commit error in conducting an *in camera* hearing of the Romanik plea, and ordering the record of the plea to be sealed.

The Court's commentary at the time of the revocation of defendant Romanik's probation did not constitute a violation of Rule 11 concerning the Court's involvement in the plea agreement between Romanik and the government. All of the cases cited by defendant suggest that it is inappropriate for a Court to be involved in the formation of a plea agreement; however, after an agreement has been reached between the government and a party, the Court must be involved. This very point is made by the principal cases cited by defendant to support his position. "Of course, once the parties have themselves negotiated a plea agreement and presented that agreement to the Court for approval, it is not only permitted but expected that the Court will take an active role in evaluating the agreement." *U.S. v. Kraus*, 137 F.3d 447, 451 (7th Cir. 1998). This Court's comments at the time of the Romanik probation revocation hearing substantiate that the parties had negotiated a plea agreement and presented that to the Court for approval. For illustration, the Court at the Romanik hearing stated "At the time that I accepted the plea agreement...." That certainly indicated that the Court was not involved in the negotiation but started an active role in evaluating the agreement.

Further comment by this Court was that "There was considerable discussion among counsel and with me

about the plea bargaining in this matter. I finally determined that it would be appropriate to accept the result of the plea bargaining, ..." This comment does not suggest that the Court was involved in determining what the plea bargaining would be, but rather whether or not to accept the agreement brought about by the bargaining between the parties. Accordingly, the comment shows that the Court accepted the agreement of the parties wherein they had stipulated that there would be a total offense level of 10 and a criminal history category of 1 for the purpose of establishing the range of punishment.

The entire transcript of the Romanik probation revocation hearing reveals that having decided that Romanik had violated the conditions of probation, it was necessary either to resentence him, or to allow him to continue on probation. The government was urging the court to alter the range of punishment and sentence the defendant to a range greater than would have been established by the stipulation that the total offense level would be 10 and the criminal history category, 1. The purpose for this Court's dialogue at that time was to reassert that it would be improper for the Court "to deviate from my part of the bargain." "My part of the bargain . . ." was that I accepted the stipulation of the parties as to the total offense level and the range of punishment. The Court felt that it would be inappropriate to change that range in resentencing Romanik because of his probation violations.

This dialogue does not indicate, in any way, that the Court was involved in the plea negotiations, but certainly shows that it was involved in evaluating the agreement, which is quite proper and is not a violation of Rule 11, or any case law construing Rule 11.

Ordinarily, if there was a Rule 11 violation, the party having the right to assert that violation would be the defendant that was involved. Romanik would be the one to make this assertion, and he has never done so.

In any event, assuming arguendo that this Court did violate Rule 11 in the Romanik case, is that a sufficient showing of bias on the part of the Judge against defendant Cueto? The Court does not believe its comments at the time of the hearing of the Romanik probation violation suggests any bias against defendant Cueto.

On this point, the Court finds more persuasive the position of the government in its response to defendant's § 2255 motion. Ordinarily, matters arising out of the course of judicial proceedings are not a proper basis for recusal. From this premise, the extrajudicial source doctrine evolved, suggesting that if there is bias and prejudice of a judge, it must come from an extrajudicial source. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 127 L.Ed.2d 474 (1994).

The extra-judicial source complained of by defendant as constituting material creating bias in the undersigned is the *East Side Review* newspaper. This was addressed extensively in the Court's memorandum and order of January 24, 2000, and need not be addressed further here.

Several assertions in defendant's memorandum in support of his motion are procedurally defaulted. On page 33 of defendant's memorandum supporting his motion, defendant states:

> "Judge Limbaugh allowed the government to introduce Romanik's grand jury testimony at trial, although he was legally and physically available to testify, but for his 'deal'."

On page 37 of defendant's memorandum, it is stated that "The Seventh Circuit has found that 'off the record' proceedings conducted by a trial judge are highly indicative of a disqualifying basis. *See Edgar v. K.L.*, 95 F.3d 256 (7th Cir. 1996)."

Each of these assertions of error were known during the trial and obviously available to appellate counsel. Any assignment of error in each instance should have been raised on appeal. They certainly do not constitute a showing of bias on the part of the trial judge.

> B. The trial judge's comments at the defendant's sentence were indicative of a bias, or an appearance of bias on the basis of which a new trial must be ordered.

Again, the Court's comments at the time of sentencing were obviously known to the defendant, his trial counsel and his appellate counsel. No assertion was made of this assignment of error until the filing of the § 2255 request for relief. It is procedurally defaulted.

In any event, this Court assumed that this assignment of error was, in effect, abandoned after the oral argument. Present counsel for the defendant, at the time of oral argument, began by setting out in substantial detail the improper conduct of the defendant. For illustration, counsel stated that defendant made uncalled for disparaging remarks in his newspaper about government officials and other persons, and handled himself in an improper manner. Counsel stated that his

client, defendant Cueto, abused the First Amendment. Counsel then concluded that whatever defendant's transgressions, he was entitled to a certain fairness which he did not have and which represented a fundamental miscarriage of justice. The Court recalls that at the end of the argument, a modest dialogue ensued between defendant's counsel and the Court suggesting that perhaps there had been an abandonment of the point now under discussion because counsel for defendant, himself, suggested defendant had abused the First Amendment. Certainly, if defendant's own counsel can suggest his conduct may have been an abuse of the First Amendment, it would not show prejudice of the Court if the Court suggested the same thing. Nonetheless, defendant was sentenced for abusing the judicial system, not for taking liberties with the First Amendment.

As set out earlier, the evaluation of a judge's prejudice in this area was examined carefully by the Supreme court in *Liteky v. U.S.*, 510 U.S. at 555. The Court stated, "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings or of prior proceedings do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties or their cases, ordinarily do not support a bias or a partiality challenge."

The comments of the undersigned at the time of the sentencing of defendant do not indicate such hostility to the defendant that they show bias on the part of the Court sufficient to support a § 2255 motion. Again, this matter as well as the extra-judicial source exception to

the rule was handled adequately in the Court's Memorandum and Order of January 24, 2000. The Court adopts that Order in addition to what is said here in response to defendant's third point in these proceedings.

Point 4

Lilly v. Virginia, 119 S.Ct. 1887 (June 10, 1999) is an intervening change of law which renders the Romanik Grand Jury testimony inadmissible requiring that defendant receive a new trial.

As previously set out, defendant Romanik entered a plea of guilty to Count 5 of the indictment, and he was not called to testify by the government or defendant Cueto at Cueto's trial on the assumption that he would invoke his right, under the Fifth Amendment, not to incriminate himself if he were, in fact, subpoenaed to testify.

At an earlier time, Romanik had testified before the Grand Jury and was asked over 150 questions. He gave no substantive answer to any question and only answered a few with a yes or a no. The majority of his responses were "I do not know" or "I cannot remember."

Over defendant's objection, assuming Romanik was unavailable as a witness, this Court allowed his Grand Jury testimony to be received in evidence as part of the government's case. This Court received the testimony following federal Rule of Evidence exception 801(d)(2)(E). The Court indicated that the unavailability of Romanik and the indicia of reliability of the testimony of Romanik was not the issue. The Court received the testimony only to show that Romanik testified falsely before the Grand Jury.

Defendant now asserts that the receipt of Romanik's Grand Jury testimony was prejudicially erroneous in that it violated defendant's Sixth Amendment right of confrontation and denied him the opportunity to cross-examine Robert Romanik about his Grand Jury testimony. To support his position, defendant cites the case of *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). That Court held that a defendant's Sixth Amendment right to be confronted with witnesses against him was violated by admitting into evidence a non-testifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the defendant.

In that case, B.L. Lilly, Mark Lilly and G.W. Barker burglarized a home and among other things, took three loaded guns. They left and committed another burglary and abducted and killed another individual. They committed two more robberies and were apprehended. Mark gave a statement to the police admitting his involvement in the burglaries and thefts, but denied having anything to do with the murder and indicated that his brother B.L. was the one who committed the murder. B.L. Lilly was tried separately for murder and other offenses. Mark was called as a government witness, but he refused to testify invoking his Fifth Amendment privilege. Mark's statement was then received in evidence as declarations of an unavailable witness against penal interests. B.L. Lilly was convicted of capital murder and the court imposed a death sentence.

The United States Supreme Court determined that the receipt of Mark Lilly's confession violated his brother's confrontation clause rights and the case was remanded to the State Court of Virginia for further proceedings. In the remand, the Court left it to the

Virginia courts to consider whether the Sixth Amendment error was "harmless beyond a reasonable doubt."

Defendant here urges that the judgment against him should be set aside on the basis of the holding in *Lilly* because this Court should not have allowed Romanik's Grand Jury testimony in evidence in the case.

The facts in this case are distinguishable from those in the *Lilly* case. In *Lilly*, Mark admitted his involvement in the burglaries and thefts, and admitted that he was present at the time of the murder but denied being involved other than his presence. His statement was direct evidence that his brother, B.L. Lilly, committed the murder.

In the *Cueto* case, Romanik was not an indicted co-conspirator as alleged in Count I of the indictment for which Cueto was found guilty. His Grand Jury testimony, although alleged as an overt act in Count I, did not state or even infer that Cueto was involved in the conspiracy. As stated, the Grand Jury testimony was so innocuous that for all practical purposes nothing was said in answer to all of the questions. Romanik continued to say that he did not recall, or he did not remember or he did not know. He did not admit his involvement in any wrongdoing, nor did he incriminate Cueto or anyone else in this testimony. The trial court received the testimony merely to show evidence that Romanik testified falsely before the Grand Jury.

The court in *Lilly* determined that "the decisive fact which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule, as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly v. Virginia*, 527 U.S. at 134.

Romanik was not an alleged accomplice of Cueto, nor did he give any kind of confession in his Grand Jury testimony that would inculpate Cueto. *Lilly* is thereby distinguished from the present case.

In any event, as suggested, if there was error in the receipt of the Grand Jury testimony of Romanik it was not prejudicial to Cueto and was, thereby, harmless. This Court is convinced that the evidence before the jury other than Romanik's Grand Jury testimony was sufficiently overwhelming to justify the findings of the jury.

Lilly did not consider whether the receipt in evidence of the statement of the accomplice without the benefit of cross-examination was "harmless beyond a reasonable doubt." Here, assuming it was error to give Romanik's Grand Jury testimony to the jury, such evidence was "harmless beyond a reasonable doubt." *Lilly v. Virginia*, 527 U.S. at 138.

Even if the Court would determine that the receipt in evidence of the Romanik Grand Jury testimony was prejudicial error as to Cueto as suggested in *Lilly*, the rule in *Lilly* should not be applied retroactively. Defendant says that it should, and for his authority cites *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Both parties agree that in *Teague* the Supreme Court stated that a new rule or an intervening change of law, such as set out in the *Lilly* case will not apply retroactively on collateral review unless the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or the new rule requires the observance of "those procedures that. . . are 'implicit in the concept of ordered liberty.'" *Teague v. Lane*, 489 U.S. at 310.

The Court finds that neither exception is applicable here. Although the right of confrontation and cross-examination are central to the concept of ordered liberty, Rule 801(d)(2)(E) is not revoked by *Lilly*. In fact, there is nothing in *Lilly* which overrules cases which have applied rule 801(d)(2)(E) as an exception to the hearsay rule. The principles of *Lilly*, accordingly, should not be applied retroactively in *Cueto*.

Point 5

The sentence should be vacated on the ground that the sentence of 87 months imprisonment and the $80,000 fine imposed under each of Counts 2, 6 and 7 was in excess of the maximum allowed by law, and the Court did not have jurisdiction to improve an excessive sentence.

Defendant was found guilty of Count 1 of the indictment alleging a violation of 18 U.S.C. § 371 and was found guilty as to Counts 2, 6 and 7 involving an alleged violation of 18 U.S.C. § 1503. He was sentenced to 60 months under Count 1 and 87 months as to each of Counts 2, 6 and 7, all to run concurrently. Before September 13, 1994, the maximum sentence for a violation of 18 U.S.C. § 1503 was five years imprisonment. The maximum was increased to 10 years by the Omnibus Crime Bill which took effect September 13, 1994. Defendant's assignment of error here is that there was no evidence to support the commission by defendant of any acts perpetrated after September 13, 1994. Therefore, it was improper to assess a penalty against defendant in violation of the earlier five-year maximum. This point should be ruled against defendant for several reasons. First, as to Count 2, the indictment charged defendant with obstruction of justice from January

1992 through the present; the alleged acts set out in Counts 6 and 7 ran from about 1993 through the present. The indictment was dated July 18, 1996 and any acts occurring until that date from the beginning times set out in the indictment were applicable. This Court determines that there was an abundance of evidence to support the allegations set out in Count 2, 6 and 7 occurring between September 13, 1994 and July 18, 1996. In fact, the appellate court addressed defendant's argument that his convictions were not supported by sufficient evidence. The court stated "Cueto's task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelmingly supports the jury's verdict." *U.S. v. Cueto*, 151 F.3d 620, 632 (7th Cir. 1998).

Defendant has just called to the Court's attention the case of *Apprendi v. New Jersey*, No. 99-478, 2000 W.L. 807189 (U.S. June 26, 2000). That decision is not relevant to the issue raised by defendant.

In *Apprendi* the court held that, other than a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. In *Cueto* it is simply alleged that there was no evidence to support crimes alleged to have been committed after Congress increased the statutory maximum punishment. This Court has determined that three was evidence to support wrongdoing from the time the statutory maximum penalty was increased to the time of the filing of the indictment. There was, therefore, nothing to present to the jury other than to find the essential elements required for each count as was properly submitted in the Court's instructions.

Finally, this issue should have been raised on appeal and is procedurally defaulted. *U.S. v. Frady*, 456 U.S. at 166. Defendant has made no showing of cause for his procedural default in failing to raise this claim on appeal. This problem has always been known to the defendant and he has failed to take advantage of it, and is out of time.

Point 6

Defendant asserts he has a good faith belief that there was numerous other *Brady* violations which can be brought to the Court's attention through discovery and/or an evidentiary hearing.

- In addition to this point, defendant has pending a motion to conduct discovery pursuant to Rule 6 of the Federal Rules governing § 2255 cases and a memorandum in support of that motion. In ruling on Point 6, the Court will also address simultaneously the motion to conduct discovery. The request and the motion in Point 6 are virtually the same.

Defendant requests the government to produce alleged Grand Jury testimony of numerous persons including Congressman Jerry Costello and Former Secretary of Energy Bill Richardson.

In addition, defendant has filed an extensive request for document production under Rule 6 of the rules governing § 2255 cases. This request shall also be addressed in considering Point Six. The request asks for documents related to the private ARDC file of defendant, subpoenas issued to the administrator of ARDC concerning defendant, motions to disqualify Judge Stiehl in the case of *U.S. v. B & H Vending*, grand jury transcripts, FBI 302 reports and notes or summaries of

interviews with at least 10 persons, including Congressman Costello and Secretary Richardson, grand jury transcripts of 302 reports of government witnesses who testified at trial, documents which indicate that the sale of B & H Vending to Brian Bechtoldt from Tom Venezia was a "sham," documents relating to applications or requests for ruling to seal the *Robinson v. Cueto* civil case, all documents related to Romanik's plea and attempts to call him as a witness in the *Cueto* case and the authentic tape of the August 10, 1992 recording made by Bonds Robinson, Jr.

On June 6, 2000 defendant submitted a request to file interrogatories and this request will also be considered as part of Point 6 of the § 2255 request. The interrogatories are:

1. Why was the Charles Grace letter to the ARDC dated May 2, 1995 not provided to defendant Cueto? Please state the name of each person who participated in the decision.

2. Was Ms. Miquelon aware of the letter to the ARDC dated May 2, 1995 prior to the Cueto trial

3. Was Mr. Grace aware that his letter of May 2, 1995, prior to the jury verdict in the Cueto trial, had not been produced by the government?

4. Did any person on behalf of the U.S. Attorney's Office ask the ARDC not to produce the Grace letter (May 2, 1995) or discuss with the ARDC that they not produce said letter? If so, please identify the parties to all such conversations.

Rule 6(a) of the rules government § 2255 proceedings provides that:

"(a) party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principals of law if, and to the extent, the judge in the exercise of discretion and for good cause shown grants leave to do so, but not otherwise."

Under Rule 6(a), discovery is available only "for good cause." *Brady v. Gramley*, 81 F.3d 684, 689 (7th Cir. 1996). "Good cause cannot exist where the facts alleged do not provide a basis for relief." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 158 (7th Cir. 1990).

Ordinarily, grand jury minutes should never be made available to the defense except disclosure is wholly proper where the ends of justice require it. "The burden, however, is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Company v. U.S.A.*, 360 U.S. 395, 399, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959).

The Court finds that defendant has not shown good cause for the discovery requested, nor has he shown a particularized need for grand jury materials, or other documents asked for.

Most of defendant's requests for discovery are highly speculative. Defendant asserts that since the government did not reveal the existence of the letter from the U.S. Attorney to the Illinois Disciplinary Commission obviously they were withholding other alleged *Brady* information. The Court has ruled that the letter involved was not *Brady* material, and it is unfounded to

surmise that as the government did not reveal one piece of correspondence there are many others that the government did not reveal as well. It is only speculation that witnesses such as the United States Congressman and Former Secretary of Defense had exculpatory evidence to give simply because they were not called by the government.

The four interrogatories tendered by the defendant all go to the assumption that there was bad faith on the part of the government in the failure to make available to the defendant the letter of the United States Attorney to the Commission. As previously stated, good or bad faith has nothing to do with the production of so-called *Brady* material, so these interrogatories are not relevant.

The Court determines that a substantial majority of the discovery requests are unrelated to any facts alleged in the defendant's § 2255 motion. These requests are nothing more than a fishing expedition to challenge the sufficiency of the evidence as to defendant's conviction. As previously noted, the sufficiency of the evidence has already been decided on direct appeal.

Defendant cites the case of *East v. Scott*, 55 F.3d 996 (5th Cir. 1995) to support his position. In that case, the claim of the defendant was that he was denied due process because a private prosecutor was involved in his prosecution. The Court determined that he was entitled to invoke discovery to determine if his due process rights had been denied because of the use of a private prosecutor. There is no parallel in that case with the facts in this case. Here, there is only an alleged theory of conspiracy or wrong-doing by the government officials involved. There would be no end to discovery requests if, in post-

conviction proceedings, a defendant is allowed to engage in any discovery on the basis of speculation and surmise.

The Court finds that defendant is procedurally defaulted in this area as well. All of these points should have been, and were not, raised on appeal. *U.S. v. Frady*, 456 U.S. at 166, *U.S. v. Salerno*, 2000 W.L. 821713 (N.D. Ill. June 23, 2000).. The cause standard required by *Frady* has not been met by defendant here. "Cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 490, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Appellate counsel for defendant apparently has some national notoriety. He presented various constitutional claims vigorously before the Court of Appeals. For his ammunition on appeal he had the services of defendant himself, defendant's trial counsel, the trial transcript and all exhibits received in evidence, and I am confident the benefit of a supporting staff, yet no one of the concerns suggested in the requests for discovery were raised as an appellate issue. There was no assignment of error that grand jury materials were withheld from the defendant, that *Brady* material was withheld by the U.S. Attorney, that notes or other records of interviews with a United States Congressman and Former Secretary of the Defense and other parties were withheld, or that any other items which the defendant now wishes to investigate have not been made available to the defendant. The request for these materials is based on rank speculation, and defendant's appellate counsel may have been of the same mind in electing not to raise such issues on appeal. Even if that was the case and was negligence, the negligence of

defendant's counsel is not an excuse. *See Murray v. Carrier*, 477 U.S. at 490.

A substantial majority of cases involving requests of § 2255 relief assert ineffective assistance of counsel. Throughout defendant's memorandum issues are now raised which should have been raised on appeal. Interestingly enough, there is no assertion in defendant's § 2255 request that appellate counsel was ineffective. This Court need not address that problem on its own.

Defendant cites *Murray v. Carrier* for the proposition that the factual or legal basis for his claim was not reasonably available to counsel, and therefore, the cause requirement is met under *Frady*. The only factual basis not available to counsel for the defendant on appeal was the letter from the United States Attorney to the Illinois Commission. We have already determined that this was not *Brady* material.

In ruling on Point 6 and defendant's various separate requests for discovery, the Court also finds that it is unnecessary to have an evidentiary hearing to consider defendant's request for relief under § 2255. Other than defendant's request for discovery, there is no need to introduce additional evidence for and in opposition to defendant's motion. The Court has before it defendant's motion and supporting memorandum, the government's memorandum in opposition, the defendant's reply memorandum, all of the defendant's requests for discovery together with supporting memorandum, the trial transcript and exhibits, the deposition of James Grogan and Sari Montgomery taken before the Hearing Board of the Attorney Registration and Disciplinary Commission in the Matter of Amiel Stephen Cueto, Attorney-Respondent, Commission No. 97 SH 100 and the appellate

decision in this case. In addition, the Court heard oral argument by counsel on the motion. There is no need for a hearing as the matters concerning the law in this case have been fully briefed.

"An evidentiary hearing is not necessary when the facts essential to consideration of the constitutional issues are already before the Court." *Matta-Ballesteros v. Henman*, 896 F.2d at 258. As this Court has determined that on the basis of all of the evidence and the law, the defendant is not entitled to relief, a hearing is not required. *Aleman v. U.S.*, 878 F.2d 1009, 1012 (7th Cir. 1989). *Humphrey v. U.S.*, 896 F.2d 1066, 1070 (7th Cir. 1990).

Defendant's motion for relief pursuant to 28 U.S.C. § 2255 should be denied. Defendant's requests for discovery and for a hearing should also be denied.

Dated this 18th day of August, 2000.

/s/ Stephen Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,
VS.
AMIEL CUETO,
Defendant.

99-831-SNL
No. 96-30070-SNL
Filed 01 JAN 26 AM 8:15

ORDER

The Court has reviewed Petitioner's motion for Certificate of Appealability and the entire file in this case, and determines that the motion for Certificate of Appealability should be denied.

IT IS THEREFORE ORDERED that petitioner's motion for Certificate of Appealability is DENIED.

Dated this 24th day of January, 2001.

s/ Stephen Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 9, 2001
Decided March 15, 2001

Before
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 01-1218

AMIEL CUETO,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 99 C 831

Stephen N. Limbaugh,
Judge

ORDER

Amiel Cueto has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no

substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,
vs
AMIEL CUETO,
Defendant.
No. 3:96 CR 30070
East St. Louis, IL
September 19, 1997

TRANSCRIPT OF SENTENCING

BEFORE THE HONORABLE
STEPHEN N. LIMBAUGH

APPEARANCES:

For the Government: MS. MARIAM F. MIQUELSON
MR. NORMAN SMITH
Asst. U. S. Attorneys
9 Executive Drive
Fairview Heights, IL

For the Defendant: MR. RONALD E. JENKINS
10 South Brentwood
Clayton, MO 63105

MR. JAMES DONOVAN
MR. CHRIS CUETO
7110 West Main Street
Belleville, IL 62223
Defendant appeared in person

Reported by: Ann J. Taylor
Official Court Reporter
1114 Market Street
St. Louis, MO 63101
(314) 621-3650

THE COURT: All right.

I am ready to rule on all of the objections to the PSI that have been made by the defendant in this case.

And I am going to do so to some extent in repeating some of the generalities that have been previously set out, and then dealing with some other areas with a greater degree of specificity.

Before I do this, are there any final comments that either party wishes to make?

MR. JENKINS: No, sir.

MS. MIQUELON: No, your Honor.

THE COURT: The PSI follows the normal method of making available to the Court information that is necessary for the purpose of the ultimate sentence in this matter.

It begins with the offense itself.

Then it adds in supplemental material the charge, convictions, co-defendant information, related cases, the offense conduct, role assessment, victim impact, adjustment for obstruction of justice, adjustment for acceptance of responsibility.

And having done all of that, then the probation officer comes to the methodology for calculating the ultimate

total offense level, the criminal history category, and the range of punishment.

First, the criminal history category has been determined to be a category of 1.

There has been no objection to that raised by either party, so I determine that is the proper criminal history category.

Before getting to the methodology of the calculation of the total offense level, I want to address the several objections that the defendant has made as to the preliminary material that I just referred to in the PSI.

First, almost all of that material has nothing to do with the methodology for calculating the range of the punishment.

It does give certain information to the Court that conceivably could be helpful in determining what the ultimate sentence might be, once the range of the punishment is calculated.

But for the purpose of determining what the total offense level is, it is not all that helpful, and it's generally background information.

Now, in this information, there are certain statements made by the probation officer, and the defendant has objected to a considerable amount of that material.

First of all, continuing to maintain his innocence in this matter; and then secondly, asserting that a lot of that material is inaccurate.

In particular, there have been objections filed to the material setting out what the offense is, the offense conduct, the role assessment and the victim impact.

And there is a substantial disagreement with the material set out in the PSI, and the objections made to this material by the defendant.

This is not unusual in any criminal case, because in most situations, as is the case here, where there has been a trial, and where the defendant continues to maintain his innocence, that there is an absolute conflict between the material that is set out by the probation officer giving the factual basis in this matter as to what - - or a comparison with what the defendant thought the factual information should be.

For the purpose of my ruling on those objections, I am going to determine what while the defendant certainly has the right at any time to maintain his innocence, and to object to any factual situation that may be presented to me by the probation officer or anyone else, for that matter, for the purpose of sentencing, that I accept the fact that he maintains his position, and the probation officer maintains her position, in the calculation - - rather in the setting out of these details.

I simply have to say, having heard this case, that I think there is ample support, both from the testimony of witnesses, and the documents that have been received in evidence, to support the material that the probation officer set out in the offense, the offense conduct, the role assessment and the victim impact, and all of that material in the PSI that immediately precedes the calculation of the total offense level.

So I am going to determine that that material is appropriate to be submitted to me, that there is evidence to support it, and at the same time I recognize the defendant's position that he disagrees with it.

Nonetheless, I do not think that his disagreement is such that I should cause the report to be altered.

I understand his position. I have read his objections. And I think I believe - - rather I understand what he is trying to say to me for the purpose of this sentencing, and I will consider that ultimately.

But it is not a basis for any alteration or change of the PSI in these areas.

Count 1 was the conspiracy county to defraud the United States.

And as has been suggested by the oral supplements, Counts 2, 6 and 7 are all obstruction of justice counts.

And the jury found the defendant guilty of the conspiracy count, Count 1, as well as the other three counts, the obstruction of justice counts, which are 2, 6 and 7.

The conspiracy count, for the purpose of the record, does involve violation of

18 United States Code, Section 371.

The three obstruction of justice counts involve the violation of 18 United States Code, Section 1503.

Having made the determination that I have with respect to these preliminary objections, at this time, I think it is appropriate that we consider the objections that have been filed as to the methodology for the calculation of the total offense level in this matter.

Now, as was suggested by Mr. Jenkins, and responded to by Miss Miquelon, the first concern in the objections has to do with the grouping analysis that the probation officer utilized.

The officer determined that there should be three groups.

There should be a separate group for each of the obstruction of justice counts.

And accordingly, Group 1 included the obstruction of justice, Count 2.

And Group 2 included the obstruction of justice count Group 6.

And then Group 3 included the obstruction of justice, Count 7.

Now, the rules provide that when you have counts like this, and a conspiracy count as well, that the conspiracy count can be grouped together with one of the three separate groups of obstruction of justice, and so the probation officer elected to include Count 1, the conspiracy count, in Group 1, together with the obstruction of justice count, Count 2.

So those two were grouped as Count 1.

And then Count 6 was Group 2; and Count 7 was Group 3.

The multiple group adjustment made by the probation officer was done pursuant to Section 3D1.4.

And when I refer to these sections, I am referring to sections in the Sentencing Guidelines.

This resulted in a combined adjusted offense level of 27, which ultimately became the total offense level.

As stated by Mr. Jenkins, he objects to this methodology of grouping.

The assertion was, and again was reiterated by Mr. Jenkins a moment ago, that basically there is only one victim here.

And since there is only one victim, there should not be three separate groups for obstruction of justice.

And he suggests that the overall victim in this matter is the societal interest in the due administration of justice.

And for his position, he cites Section 3D1.2 of the Application Note 2 to that section.

Now he suggests that when we are considering victims, and then ultimately which combine into the societal interest in the due administration of justice, that we should lump a variety of individuals and entities together for that purpose.

He refers to the tavern owners in this case, and the Illinois State Police, the Illinois State Liquor Commission, the defendants in the racketeering conspiracy case, and the other individuals and entities.

He suggests that these are either indirect or secondary victims, and that they should not be considered as separate victims.

Now, the defendant cites no cases to support the rationale that he has submitted to the Court.

The Government has responded to the position of the defendant, and to the objection with the citation of a number of cases.

And the Court has reviewed all of these cases for the purpose of making the ultimate determination as to whether the calculation of the probation officer with respect to grouping is correct or not.

The cases that were cited by the Government, and I am going to quote these for the record in just a moment, involve factual situations that are different from the factual situation in this particular case.

However, the Government asserts that the rationale of those cases can be compared favorably in making a determination as to the grouping assessment in this case.

Now, in those cases, there was a dealing with a various assortment of factual situations where there was an urging that there may have been a similar situation as we have here as it is urged to be the societal interests in the due administration of justice; and in most of those cases, rejected that argument concerning the facts of those cases, determining that there were separate and independent persons and entities that would warrant separate grouping.

Now, the first case cited was a Seventh Circuit case, 1995 case, it's U.S. vs. Owolabi, 69 F3d 156.

A New Jersey district court case was cited, U.S. vs. Bertoli, 854 Fed Supp 975, a 1994 case.

U.S. vs. Beard, 960 F2d 265, a 1992 Eleventh Circuit case.

And U. S. vs Seligsohn, a 1993 Third Circuit case. It's 981 F2d 1418.

In the Owolabi case, which was the Seventh Circuit case, again the facts of that case were dissimilar to the facts in this case, but I feel were analogous.

The Court in the Seventh Circuit rejected the argument that there was a single victim, and asserted that

the grouping methodology that was ultimately used by the trial court in that case was correct.

And it set out the reasoning for that determination, and I feel that that reasoning is analogous to support the facts of this case as well.

In the Bertoli case, the Court stated that while numerous courts have recognized that even where the Government or society is the only apparent victim of a crime, the interests represented by these entities may be so distinct as to constitute multiple victims.

Applying that reasoning, which is really a paraphrasing of the reasoning in the Seventh Circuit case, U.S. vs. Owolabi, I am going to make the determination that the probation officer properly utilized the grouping procedure here, and considered multiple victims for the grouping purposes, as opposed to the single victim urged by the defendant.

So I determine that there are multiple victims as charged in the indictments in Count 2 and in Count 6 and in Count 7, and that the grouping methodology is appropriate to be utilized in the Cueto case.

In making this decision, I am also influenced by the reasoning set out by the probation officer in her addendum to her, particularly at Page 3 of the addendum. It is in response to Objection 8. It continues throughout Page 4, and then the top of Page 5.

For further support for my decision in this matter, I adopt that reasoning, in addition to what I have said heretofore.

The base offense level in both Group 2 and Group 3 is a 12.

And this is set out in Section 2J1.2, and again involves the violation of 18 United States Code, Section 1503.

The base offense level in Group 1, were only Count 2 involved, it would probably be a 12 as well; But since the conspiracy count is included in Group 1, and the violation in that count, under 18 United States Code, Section 371, then the Sentencing Guideline

Section 2C1.7(a) would be applicable.

And that utilizes the base offense level of a 10 for the purpose of the first group; as opposed to 12 as the base offense level in Groups 2 and 3.

I determine that the base offense level of 10 for Group 1 is correct; and the base offense level of 12 or Groups 2 and 3 are also correct.

And I do not believe that there is any substantial objection to that determination at least.

Now, the next objection that's made by the defendant goes to the material in Group 1.

The probation officer determined that there should be an upward adjustment of eight levels in Group 1, according to the provisions of Section 2C1.7(b)(I)(B).

Now, that section states basically that if the offense involved an elected official, or any official holding a high level decision-making or sensitive position, the base offense level should be increased by eight levels.

Now, the objection that the defendant has here is that when the section refers to involvement of an elected official, that that means that it's necessary to show that the elected official himself or herself, in fact, may have committed the crime also; and that since there is no

substantial evidence to show that at least some of the elected officials in this matter, to which there is a reference, that the eight levels should not be added or adjusted upward.

Again, this is the rationale of the defendant, and there is no authority cited for the position.

The case of U.S. vs. Manges, cited by the Government, I think is persuasive here.

It's Fifth Circuit 1997 case, 110 F3d 1162 and 1179.

And in that case, it involved a fraud situation.

The Court held that the guidelines, in considering the possibility of the eight-level addition, do not require proof that the public official involved in the fraud situation in that case retained the money, or wielded his influence corruptly, or in effect was a part of the crime himself.

And the court went on to say that enactment is appropriate, that is the eight-level enactment, is appropriate, if the offense involved any official holding a high level decision-making or sensitive position.

So the Court determined there - - and I am going to follow that principle as well - - that the issue is not whether the official may have committed the crime, but simply was in fact involved with the overall circumstances.

Now, in this case, again having heard the received, I am confident that there was more than ample material to show that the Mayor of the Village of Washington Park, the Chief of Police of the Village of Washington Park, were actually co-conspirators, and could qualify

even under the defendant's objections; and that they were public officials under the guidelines; and that these parties were involved substantially in carrying out the purpose of the conspiracy.

In addition, following the rationale in the Manges case, I am going to find that there is both direct and circumstantial evidence, and inferences that might be derived from that evidence involving Congressman Costello and St. Clair County Judge Radcliffe.

Certainly, these persons were officials holding high level decision-making or sensitive positions.

Now, in making this finding, I'm not finding that these persons were guilty as co-conspirators.

I am simply finding that they were involved for the purpose of applying the enhancement provision of this particular section of the guidelines.

Accordingly, I am going to rule this objection against the defendant, and determine that it is appropriate to add eight levels to Group 1, pursuant to Section 2C1.7(b)(1)(B).

Now, the next objection of the defendant is to the addition to four levels.

This is in all three groups, Group 1, Group 2 and Group 3, in which there was a finding by the probation officer that the defendant was an organizer or a leader of criminal activity, which involved five or more participants, or was otherwise extensive.

Now, if I make the determination that there is accurate here, then under the provisions of Section 3B1.1(a), it is proper to add four levels in each of the three groups.

I have, for the purpose of making this determination, examined the facts that I should consider, in Application Note 4 to Section 3B1.1, and having done so, and having heard all of the evidence in the case, again, I am going to determine there is ample evidence in this matter to show that the defendant was an organizer and leader of a criminal activity that involved five or more participants, or that was otherwise extensive.

The fact that there may have been other findings as to other participants in the criminal activity does not deter my conclusion in this matter.

That was a point that was urged by the defendant in his objection in this matter, particularly concerning the level that was allocated to Mr. Venezia in that case.

So that particular objection is not persuasive to me, because I think there is abundant evidence to support the upward adjustment pursuant to the section that I have referred to in this matter.

Now, the next objection of the defendant is to the addition of two levels in each of the three groups, again pursuant to Section 3C1.1.

This is a situation that is somewhat delicate, and I am going to make a number of general findings, and then I am going to make some specific findings in it.

I find it is delicate, because I think the position of the defendant, from an analytical point of view, is quite rational, and that I should examine this with great care, and I am going to do so.

The probation officer added two levels in each of the three groups, pursuant to Section 3C1.1.

The reason for doing that follows the section, which says that if someone - - that is a defendant - - gives false testimony, that it could give rise to an enhancement for obstruction of justice under 3C1.1.

And defendant's argument, which I feel is quite proper, is that he has every right to defend himself, and to take the stand and testify.

And that the fact that he may have testified, exercising his constitutional right to do so, should not be held against him for the purpose of giving him an upward adjustment of two levels, on the theory that he falsified his testimony, when in fact he did testify before the jury.

Now, the defendant urges that he - - and reminds me that he did testify for two full days, and that's correct; and not only did he have substantial direct examination, he had substantial cross-examination.

And he states that having been on the stand for that long a period of time, that it's obvious that there could be some things which he may have testified to which could have been inconsistent with the testimony of the Government witnesses.

And he urges that he not be penalized in this regard for exercising that right.

But I am persuaded that philosophically he is correct in his position, absent further findings.

The defendant in this matter - - or rather the Government, has cited certain cases that I think are pertinent for consideration in determining whether I should accept the defendant's position.

And these cases basically say that a defendant who in fact does testify, and makes perjurious statements in so testifying, instructs - - obstructs or impedes the administration of justice for the purposes of the application for sentencing of Section 3C1.1.

Now, these cases are U.S. vs. Dunnigan 113 Supreme Court 1111. It's a 1993 United States Supreme Court case.

U.S. vs. Hickok, 77 F3d 991. It's this circuit case, 1996.

U.S. vs. Carson, 9 F3d 576 and 578, a 1993 case in this circuit, the Seventh Circuit, and then U.S. vs. Glover, 101 F3d 1183, 1192. And again, it's a 1996 Seventh Circuit case.

I feel that since this matter, to me, is delicate, that I should quote some of the language from some of these cases that I think will be helpful to me in making an ultimate decision.

In the Dunnigan case, and there is the United States Supreme court case, the Court stated that:

"It is rational for a sentencing authority to conclude that a defendant who commits a crime, and then perjures himself in an unlawful attempt to avoid responsibility, is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened, as compared with the defendant charged with the same crime who allows judicial proceedings to progress, without resorting to perjury."

The Hickok case, in this case set out some rules of procedure that also I think are helpful to me in making the ultimate resolution of this issue.

In that case, the Seventh Circuit, which in effect was construing the rationale of the U.S. Supreme Court case in Dunnigan, stated that "A district Court," which is where we are - -

- - "in deciding whether to apply a sentence enhancement for obstruction of justice need not conduct a mini-trial with respect to each of the defendant's false statements, nor is it necessary for the sentencing judge," and that's me, "to set forth his findings specifically in terms of the elements of perjury.

"Separate findings on each element of perjury are not strictly necessary, as long as the Court determines that the defendant lied to the Judge and the jury about matters crucial to the question of his guilt."

I'm going to determine, after giving this matter substantial consideration, that the defendant did in fact perjure himself, both to me and to the jury, about matters crucial to the question of his guilt at the time of his testimony.

I feel that this finding, in and of itself, pursuant to the authorities that I have just cited, is sufficient to determine that there should be a two-level increase, pursuant to the provisions of Section 3E1.1.

Nonetheless, there have been other Seventh Circuit cases which indicated that perhaps the Court, in some instances, conceivably should be more specific.

In the Carson case, for illustration, the trial judge in that case stated that he based his statement in giving

this two-level increase that the defendant perjured himself because the jury, in order to find the defendant guilty, had to find that he had not told the truth on the witness stand.

And then, in any event, the trial court in that case determined that the Court, in addition to the jury finding, made an independent conclusion on his own that after a consideration of all of the evidence the defendant's testimony was false.

The Seventh Circuit in the Carson case ruled that was adequate, and sufficient for making the ultimate determination.

So following that decision, I am going to find that the defendant perjured himself in his testimony at trial, first because the jury had to find that he had not told the truth when testifying, in order to find him guilty; and was required to believe other witnesses who testified contrary to what the defendant may have said.

And second, I am going to determine, on my own, from my consideration of the evidence in the case, that the defendant did not tell the truth when he testified before the jury, and that the other witnesses who testified contrary to him, in many instances, were more believable.

And I make this finding that the defendant did not tell the truth on the witness stand about matters crucial to the question of his guilt.

Now further, with a greater degree of particularity, my recollection is that the defendant testified that he - - and I am paraphrasing - - that he had permission from Attorney Robert Haida to file fictitious court orders, and

to bring Liquor Agent Bonds Robinson before Judge Radcliffe.

Mr. Haida testified at great length to the contrary.

There is some documentary evidence, as well as inferences, that I have the right to consider, from the testimony of other witnesses, and documents that this was a blatant falsehood on the part of the defendant.

The defendant also testified that in effect that he did not know that Thomas Venezia was distributing illegal gambling machines, and was using those machines for an illegal purpose.

Numerous more believable witnesses testified - - believable witnesses testified to the contrary.

And I determine also that this testimony, in this particular, by the defendant was false.

The defendant also denied that he was a partner with Thomas Venezia in the Club Exposed enterprise.

There was a great deal of evidence to the contrary.

I am determining that in that area, the defendant falsified his statement as well.

There are many other areas which I could address with particularity, which I am not going to do so, in which I am firmly convinced that the defendant blatantly falsified his testimony for the purpose of avoiding responsibility.

I don't think there is any need to itemize additional areas on the basis of the citations that I have set out, and the reasoning of the courts in those cases.

Obviously the jury disbelieved the defendant. I disbelieved him.

Accordingly, he has subjected himself to the two-levels increase within the meaning of the Section 3B1.1.

And I find these two levels were appropriately added in each of the three groups, 1, 2 and 3.

Now, the next objection raised by the defendant last to do with the addition of three levels in Group 2 and in Group 3, as the offense resulted in the substantial interference with the administration of justice.

The probation officer did this following the provisions of Section 2J1.2(b)(2).

Application note, which both the defendant in his objections, and the Government in response, have utilized, to that section, provides that:

"A substantial interference with the administration of justice includes a premature or improper termination of a felony investigation, an indictment, verdict, or any judicial determination, based upon perjury, false testimony, or other false evidence, or the necessary expenditure of substantial governmental or court resources."

Now, the principal argument here is as to the last phrase of that application note.

And the defendant urges for me to find that there were no unnecessary expenditures of substantial governmental or court resources which may have occurred in this matter, and that therefore, there should not be an addition of three levels in Groups 2 and 3 pursuant to that section.

The Government counters that argument, reiterating the - - or at least referring to the testimony of both Sandra Nations and Erin Griffin-Venezia.

Both of these parties in effect testified that but for the control exercised over each of them in the defense in the Venezia racketeering case in which those two parties were charged, that each would have considered and probably entered pleas of guilty, and would not have gone to trial, and conceivably would have cooperated with the Government, which they ultimately did, in any event.

Thus, the issue is whether or not, if I believe those two parties, and if I believe that their concern in going ahead with the trial of the racketeering case caused the defendant to spend unnecessary resources and utilize unnecessary resources, had the influence of the defendant in those cases not been present, that I can consider those factors in determining whether or not this upward adjustment should be made.

The Government also asserts that but for defendant's attacks on the racketeering investigation, the racketeering case would not have taken as long to investigate or prosecute.

That's, of course, a matter that I would need to determine from the information that I have before me.

However, I can consider some facts that are known to me because of the evidence that was brought before me in the Cueto case.

And I do recall that after one of the raids, the gambling business was in fact virtually stopped, because of the seizure of so many, if not all, of the machines.

However, through testimony that I believe, and through the resultant efforts therefore of Mr. Venezia and the defendant in this case, that the gambling business moved forward again very quickly with new machines, or other machines that were utilized.

Agent Joseph testified that the injunction that was obtained by Judge Radcliffe September the 1st, it was well known as a part of this case, virtually terminated the investigation, until some alternative strategy could be put in motion to continue this investigation.

The defendant contested this throughout the trial, and still does.

However, I find that in these areas, that the Government's position is more persuasive, and I determine therefore that there was a substantial interference with the administration of justice, which did in fact result in unnecessary expenditure of governmental or court resources, and which warrants the addition of three levels in Count 2 and Count 3, pursuant to the provisions of Section 2J1.2(b)(2).

Now, a final objection is made as to the calculations as to the addition of two levels, again in Group 2 and Group 3.

As it was asserted by the probation officer that the defendant abused his position of trust as a fiduciary of the court system; and that therefore those two levels should be added in each of those two groups, pursuant to Rule 3B1.3.

The defendant urges that this has already been considered, and is factored in in the calculation of the base offense level; and with the determination of the specific

offense characteristics in Section 2J1.2, and that therefore these two levels should not be added, since it has already been factored in in other calculations and determinations that the probation officer made, and which I have approved.

This argument actually is not persuasive to me, as there have been holdings by some courts that an abuse of a position of trust is not listed as an included specific offense characteristic under the provisions of Section 2J1.2.

There is a Northern District of Illinois case, Fed Supp case, that so holds. It's U.S. vs. Franklin, 839 Fed Supp 916 at 920. It's a 1993 case.

And then an Eighth Circuit case, U.S. vs. Post, 25 F3d 559, a 1994 case.

I am convinced that the defendant, as an officer of this court, abused his position as an officer of the court, and therefore a position of trust in carrying out the unlawful scheme.

In this matter, I am also going to cite the case of U. S. vs. Herrington, a Fifth Circuit case, 114 F3d 517. It's a 1997 Fifth Circuit case.

And again, the Franklin case, which was the Northern District of Illinois case.

So I am going to overrule the objection and determine that the two-level increase is applicable in Group 2 and Group 3, pursuant to the provisions of Section 3B1.3.

I am confident that the rulings that I have made are accurate.

For the purpose of the record, however, I am going to note that even if I have made inappropriate findings concerning the application of Section 3B1.3 in Group 2 and in Group 3, it would not change the total offense level.

The adjusted offense level for Group 2 and Group 3 would be reduced to 21, if the application of 3B1.3 is inappropriate.

Nonetheless, there would still be one unit attached to each of the three groupings.

A greater adjusted offense level of 24 as to Group 1 would still be applicable, and the total offense level would continue to be 27.

The same reasoning applies, even if I may have made an inappropriate assessment

as to the three-level increase in Group 2 and Group 3, pursuant to the provisions of Section 2J1.2(b)(2).

Having made that determination, I still stand by the rulings that I have made, and I have no reservation whatsoever in my finding that it is correct that the adjusted offense level as to Group 1 is 24, and as to Group 2 is 23, and as to Group 3 is 23.

The greater adjusted offense level therefore is 24.

To that level, there is a one-unit adjustment added as to each of the three groups, or a total of three, which results in an additional increase of three levels to the adjusted offense level of group 24 - - to the adjusted offense level of 24 in Group 1.

And when adding the three levels to the 24, this will make a combined adjusted offense level of 27.

I find that is appropriate, and that that should therefore be the total offense level.

Accordingly, I am going to determine that the total offense level is 27, the criminal history category is 1.

Having made the decision with respect to the objections to the presentence investigation report, I am now ready to consider the motions for upward and downward departure.

The motion for upward departure was filed by the Government as stated, and the motion for a downward departure is incorporated in the objections of the defendant to the PSI, to be used in that sense, or if not, to be considered in rejecting the motion for upward departure.

THE COURT: All right.

Mr. Cueto, if you and counsel will come forward please.

I really feel that one of the jewels of our system is the First Amendment.

And the First Amendment gives all of us unprecedented rights that other people in the world do not have.

It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.

And for that you should be punished.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff/Respondent,
vs.
AMIEL CUETO,
Defendant/Petitioner.

Case No. 99-831-SNL
FILED 00 JAN 25 AM 8:33

MEMORANDUM AND ORDER

[5]The newspaper articles referred to are in connection with a newspaper owned and published by defendant Cueto called the East Side Review. In the East Side Review, Cueto personally authored several articles in which he complained of prosecutorial misconduct in association with the racketeering case and maligned the integrity and reputations of several Assistant United States Attorneys involved in the investigation and prosecution of the racketeering case.

APPENDIX F

United States District Court
Southern District of Illinois at East St. Louis

UNITED STATES OF AMERICA
v.
Amiel Cueto

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed
On or After November 1987)

Case Number 3:96CR30070-001
Ronald Jenkins, James Donovan
Defendant's Attorney

FILED: 97SEP 19 PH 3:

THE DEFENDANT:

❑ pleaded guilty to count(s)
❑ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 1,2,6,7 after a plea of not guilty.

Title & Section	18 U.S.C. §371
Nature of Offense	Conspiracy to defraud the United States
Date Offense	07/18/1996
Count	1
Title & Section	18 U.S.C. §1503
Nature of Offense	Obstruction of Justice
Date Offense	07/18/1997
Count	2, 6, 7

The defendant is sentenced as provided in pages 2 through 7 of this judgment The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 3, 4 and 8

❑ Count(s) _____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 32840-0280

Defendant's Date of Birth: 02/22/1949

Defendant's USM No.: 03757-025

Defendant's Residence Address:
#1 Raintree Woods
Belleville, IL 62223

Defendant's Mailing Address:
#1 Raintree Woods
Belleville, IL 62223

Date of Imposition of Judgment 09/19/1997

/s/ Stephen N. Limbaugh

Stephen N. Limbaugh

U.S. District Judge

9/19/97

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 87 month(s)

Sentence consists of 60 months as to Count 1 and 87 months on each of Counts 2, 6 and 7, to run concurrently.

❑ The court makes the following recommendations to the Bureau of Prisons:

❑ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district

☒ at 12:00 a.m./p.m. on 10/01/1997

❑ as notified by the United States Marshal.

❑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

❑ before 2 p.m. on _____

❑ as notified by the United States Marshal.

❑ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to _____at _____with a certified copy of this judgment

_____
UNITED STATES MARSHAL
By_____
Deputy U.S. Marshall

SUPERVISED RELEASE

Upon release from imprisonment the defendant shall be on supervised release for a term of 2 year(s)

Consisting of 2 years on each of Counts 1, 2, 6 and 7 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

❑ The above drug testing condition is suspended based on the courts determination that the defendant

poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person. convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer,

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall per-

mit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall provide the US. Probation Office with any and all requested financial information. Defendant to surrender passport.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment	$350.00
Fine	$80,000.00
Restitution	$_____.__

❑ If applicable, restitution amount ordered pursuant to plea agreement $

Fine consists of $20,000.00 as to each of Counts 1, 2, 6 and 7.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

❑ The court determined that the defendant does not have the ability to pay interest and it is ordered that

❑ The interest requirement is waived.

❑ The interest requirement is modified as follows:

RESTITUTION

❑ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

❑ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee

*Total Amount of Loss

Amount of Restitution Ordered

Priority Order or Percentage of Payment

Totals: $_____ $_____

*Findings for the total amount of losses are required under Chapters 109A, 110, 1110A and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment, (2) restitution; (3) fine principal; (4) cost of prosecution;

(5) interest (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____day(s) after the date of this judgment In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____- over a period of _____ year(s) to commence _____day(s) after the date of this judgment

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant shall pay costs of incarceration as follows: Either S37,500.00 due within 30 days OR S500.00 per

month payable every 10 months (S5,000.00 every 10 months).

❑ The defendant shall pay the cost of prosecution.

❑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment All criminal monetary penalty payments are to be made to the., Clerk, United States Court, P. 0 Box 249, 750 Missouri Avenue, East St Louis, IL 62202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

❑ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: I

Imprisonment Range: 60 to 87 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 12,500.00 to $ 125,000.00

❑ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

❑ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

❑ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 11 0A and 11 3A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

❑ Partial restitution is ordered for the following reason(s):

❑ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence imposed by this Court is sufficient to punish the defendant for the crimes committed, as well as serve as a deterrent to others.

OR

❑ The sentence departs from the guideline range:

❑ upon motion of the government, as a result of defendants substantial assistance.

❑ for the following specific reason(s):

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,
vs.
AMIEL CUETO, THOMAS VENEZIA,
and ROBERT ROMANIK,
Defendants.

CRIMINAL NO. 96-30070-WDS
Title 18, United States Code,
Sections 371, 1503, 1623, 2 and 3551, *et seq.*

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1
CONSPIRACY TO DEFRAUD THE UNITED STATES
18 USC § 371

INTRODUCTION

At all times relevant to the Indictment:

1. There were in force and effect criminal statutes of the State of Illinois involving illegal gambling, including Illinois Revised Statutes, 720 ILCS 5/28-1 et. seq., formerly Ch. 38 §28-1 (Ill. Rev. Stat.), that made it a crime to use or agree to use video poker and video slot machines to track customer winnings and compensate or "payout" such winnings to customers.

2. There was in force and effect a federal statute, Title 18, United States Code, Section 1955, that made it a crime to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business involving video gambling machines in violation of the gambling laws of the state in which the gambling business was conducted and which gambling business remained in substantially continuous operation for a period in excess of thirty days, and had a gross revenue of more than $2,000 for a single day.

3. There was in force and effect a federal statute, Title 18, United States Code, Section 1511, that made it a crime to conspire and agree to obstruct the enforcement of state criminal gambling laws with the intent to facilitate an illegal gambling business.

4. It was and is within the jurisdiction of the Federal Bureau of Investigation to investigate and refer for criminal prosecution violations of, among other crimes, the federal racketeering, anti-gambling and obstruction statutes.

5. It was within the authority of the 1994-1 federal grand jury, duly empaneled in the Southern District of Illinois, to investigate and return criminal indictments for violations of, among other crimes, federal racketeering, anti-gambling and obstruction statutes.

6. It was and is within the jurisdiction of the federal District Court for the Southern District of Illinois to preside over the prosecution of all federal criminal cases, including but not limited to, violations of the racketeering, anti-gambling and obstructions statutes, Title 18, United States Code, Sections 1963, 1511 and 1955.

PARTIES

7. Defendant AMIEL CUETO was and is an attorney licensed to practice in Illinois and specializing in personal injury litigation. Defendant CUETO's law offices were located in Belleville, Illinois in St. Clair County at various locations and at various times, including 123 W. Main Street and 101 S. First Street. CUETO would and did act as a self styled "power broker" in party politics in St. Clair county.

8. Defendant THOMAS VENEZIA was the sole owner of B&H VENDING/ACE MUSIC CORP., (hereinafter "B&H"), an Illinois corporation that operated a multi-million dollar illegal gambling business, as defined in Title 18, United States Code, Section 1955, through which B&H distributed video gambling machines to bar owners in the Metro East St. Louis area beginning in at least 1988. The B&H corporate offices were located in Belleville, Illinois in St. Clair County at various locations and at various times, including 123 W. Main Street and 101 S. First Street.

9. On or about March 30, 1995, Defendant VENEZIA, B&H and others were indicted by the 1994-1 federal grand jury in Criminal No. 95-30024, on charges of criminal racketeering, illegal gambling, obstruction of state and local law enforcement of state gambling laws and conspiracy, all arising out of the operation of VENEZIA through B&H beginning in at least 1988 and continuing through 1995 [hereinafter referred to as the "racketeering case"]. The case was set for trial in the federal District Court for the Southern District of Illinois. On December 2, 1995, defendant VENEZIA and B&H were convicted of racketeering, illegal gambling, conspiracy to obstruct the enforcement of state gam-

bling laws and conspiracy to defraud the United States by obstructing and impeding the Internal Revenue Service.

10. During the time that defendant VENEZIA operated the multimillion dollar illegal gambling racket, VENEZIA offered "protection" to B&H customers who were arrested by the Illinois State Police on charges of operating the illegal gambling business in their taverns to enable B&H customers to continue to operate in violation of state and federal anti-gambling laws for the benefit of the gambling enterprise. For this protection, VENEZIA hired and paid for defendant CUETO's law firm to "take care" of the gambling cases without the customers having to appear in court. Defendant VENEZIA claimed the CUETO "owned" 15 of 17 judges in the St. Clair county courthouse.

11. Defendants CUETO and VENEZIA became business partners in numerous financial and business deals as more fully set forth in this indictment. B&H revenues, derived in substantial part from the illegal gambling business, provided defendant VENEZIA with money and assets to participate in the numerous financial dealings with defendant CUETO.

12. Defendant ROMANIK was and is a licensed private investigator operating Romanik Investigations. ROMANIK performed various investigative services for CUETO's law firm. At CUETO's instruction, ROMANIK performed certain investigative activities to further the goals of the conspiracy as more fully set forth in this indictment. During 1993, defendants CUETO and VENEZIA assisted ROMANIK in obtaining a political appointment as the Director of Public Safety in the Village of Washington Park. In that capacity ROMANIK

served as the chief law enforcement officer in Washington Park. Also during 1993, defendant CUETO helped negotiate the sale by ROMANIK to VENEZIA of certain real estate in Centreville, Illinois. Subsequent to the real estate transaction, CUETO, acting as VENEZIA's silent partner, and VENEZIA constructed a topless bar known as "Club Exposed" on the property. Thereafter, VENEZIA operated the B&H illegal gambling operation at Club Exposed.

BUSINESS RELATIONSHIPS OF THE PARTIES

13. VENEZIA purchased the office building located at 123 W. Main St. from CUETO on April 1, 1991 for a purchase price of $190,000. On May 20, 1993, VENEZIA purchased the office building located at 101 S. First St. from CUETO for a purchase price of $1.3 million dollars. Both buildings were used as the B&H corporate offices out of which the illegal gambling operations were controlled and operated.

14. During 1993, defendants CUETO and VENEZIA purchased the LaClede Cab company out of bankruptcy. At or about the same time, in April 1993, CUETO and VENEZIA purchased an asbestos removal company for $550,000 which later became known as "Millennium III." In order to fund the approximate $600,000 in combined acquisition costs for LaClede Cab, Millennium III and VENEZIA's down payment on the 101 S. First St. property, defendants CUETO and VENEZIA borrowed one million dollars from the Magna Bank on July 8, 1993. Of the remaining loan proceeds, $300,000 was used for "lease purchase improvements" at Club Exposed. VENEZIA's financial statements filed in the bankruptcy court and with the bank listed B&H as the single most valuable income producing asset held by

Venezia for purposes of establishing VENEZIA's financial ability to borrow money and acquire the subject business interests along with CUETO.

15. In August 1993, VENEZIA executed an agreement to pay $700,000 to ROMANIK to acquire the real estate on which Club Exposed was to be built. CUETO became VENEZIA's silent partner in Club Exposed and in the first three months of 1995, CUETO was paid $5,000 in cash per month by VENEZIA for CUETO's share of the Club Exposed profits. VENEZIA paid the cash out of a B&H "slush fund" acquired by skimming money from the B&H operations. The operation of the B&H illegal gambling business at Club Exposed generated substantial revenues and became necessary to the financial success of the nightclub operation.

16. From approximately January 1, 1993 through and including January 7, 1994, defendant CUETO paid ROMANIK $250,000 from his personal bank account. In response to a grand jury subpoena issued in July 1995, ROMANIK produced a document signed by CUETO and himself which stated that CUETO had loaned $250,000 to ROMANIK "to start a new business" and that ROMANIK was required to repay the principal along with an additional $250,000 interest payment.

17. Beginning in approximately July 1994, CUETO along with VENEZIA, and others formed an investment group known as "DKCO" or DeKalb Crab Orchard, Inc. The business purpose of DKCO was to develop the first land based gambling casino on an Indian Reservation in Illinois. As part of this deal, defendant CUETO formed a company known as IllArt to hold a 35% interest in DKCO. CUETO held a 50% interest in IllArt for himself and an undisclosed business partner who was then a

public official. A 25% interest, purchased with money from B&H, was put in the name of Erin Griffin as a nominee for VENEZIA and the remaining 25% interest was held by another investor. As a further part of the deal, CUETO deeded approximately 32 acres of riverfront property into a company known as "EnFuturo." CUETO, VENEZIA and a third investor borrowed $600,000 from West Pointe Bank to fund EnFuturo's purchase of the riverfront property from CUETO. The riverfront property was to be used in a swap transaction designed to give CUETO, VENEZIA and a third party investor a controlling interest in the company managing the casino. As a further part of the deal, B&H was to be the supplier of the video gambling machines to the casino.

18. During 1993 and 1994, CUETO and VENEZIA formed AG Enterprises, Inc., with each owning a 1/2 interest in the company. CUETO and VENEZIA each contributed $150,000. VENEZIA's $150,000 was supplied from B&H funds. CUETO and VENEZIA agreed to advance the $300,000 for the development of a gambling casino in exchange for a note from the developer promising to pay 2.4 million dollars to AG Enterprises at a future date.

19. Beginning in at least 1990 and continuing throughout 1996, CUETO paid approximately $560,000 to a printing company known as the Century Printing Co. located in Belleville, Illinois. Century Printing was originally set up with a 50% ownership interest held in the name of a CUETO family member. During 1995 and 1996, CUETO, through his company known as the 1967 Corporation, paid an additional $215,000 to Century Printing which monies were used to publish a CUETO authored tabloid known as the "East Side Review."

THE CONSPIRACY

20. In or about and between January 1, 1992, and continuing through the present, both dates being approximate and inclusive, in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO,
THOMAS VENEZIA, and
ROBERT ROMANIK

together with others, known and unknown to the grand jury, did unlawfully, knowingly, and intentionally combine, conspire, and agree to defraud the United States by impeding, impairing, obstructing and defeating and attempting to impede, impair, obstruct and defeat the lawful functions of the Federal Bureau of Investigation, the 1994-1 federal grand jury and the United States District Court for the Southern District of Illinois in the performance of their respective investigative and judicial functions in the due administration of justice.

21. An objective of the conspiracy was to interfere with the investigation and criminal prosecution of the B&H racketeering organization and its members and thereby prevent the dismantling by federal authorities of the multi-million dollar illegal gambling operation in an effort to safeguard the defendants' valuable joint business and financial interests and to protect themselves and/or each other from future criminal prosecution. It was a further objective of the conspiracy to accomplish the interference of the investigation and prosecution of the illegal gambling business by engaging in and attempting to engage in, at various times and by various defendants, numerous acts including but not

limited to, attacking and discrediting a state law enforcement agent assisting the FBI; providing false information to state and federal law enforcement agencies; filing false court pleadings in connection with the legal proceedings before the federal grand jury, the federal district court, the federal court of appeals for the Seventh Circuit and the United States Supreme Court; manipulating and attempting to manipulate state and federal court proceedings for the benefit of the gambling racket; pretending not to recall information when questioned before the federal grand jury; corruptly influencing prospective grand jury witnesses by advising them to avoid appearing before the grand jury to provide testimony; and, offering political rewards to a public official to encourage cooperation in the scheme. It was a further objective of the conspiracy to interfere with or obstruct lawful governmental functions by deceit, craft, trickery and dishonest means.

MANNER AND MEANS OF THE CONSPIRACY

22. It was a part of the conspiracy that beginning in or about 1988 and continuing through 1995, defendant THOMAS VENEZIA, along with others, operated an illegal gambling business as part of a racketeering enterprise through B&H.

23. During the conspiracy, in March, April and August 1992, the Illinois State Police, accompanied by an Illinois Liquor Commission Agent, Bonds Robinson, conducted gambling raids and made arrests at one of the most profitable B&H gambling stops known as the VFW Post #4183, located adjacent to the Scott Air Force Base.

24. It was a further part of the conspiracy, that CUETO's law firm would and did represent VFW employees arrested for gambling violations as part of a

protection package offered by B&H to its customers which included payment of attorneys fees, court costs, and fines so that the customers could and would continue to operate in violation of state and federal anti-gambling laws for the benefit of the gambling enterprise.

25. It was a further part of the conspiracy that CUETO was the attorney for VENEZIA, B&H and the gambling customers in violation of the Illinois Rules of Professional Conduct that prohibit attorneys from engaging in the multiple representation of clients with conflicting legal interests.

26. It was a further part of the conspiracy that CUETO, VENEZIA, ROMANIK and others would and did engage in a series of acts to attack and attempt to discredit Agent Robinson in an effort to impair, impede and obstruct the federal investigation and prosecution of the illegal gambling business and to conceal the existence of the racketeering enterprise, including but not limited to the following:

a) in or about April 1992, CUETO's law firm unjustifiably reported Agent Robinson to this superiors at VENEZIA's urging and erroneously claimed that Robinson had attempted to solicit bribes from VFW employees when in truth and in fact Cueto's law firm represented the VFW employees and none of the VFW employees ever told CUETO or members of his law firm that Robinson had solicited bribes;

b) in or about August 1992, ROMANIK would and did advise members of the racketeering enterprise that Agent Robinson should be "set up" to get

Robinson before he further exposed VENEZIA's gambling business;

c) on August 17, 1992, VENEZIA, along with another member of the racketeering enterprise, would and did attempt to bribe Agent Robinson, while Robinson was acting in an undercover capacity for the FBI, to corruptly influence Robinson in the performance of his official duties, including but not limited to, the enforcement of anti-gambling laws in the State of Illinois;

d) on August 26, 1992, a few days after VENEZIA's bribery attempt on Agent Robinson, the Illinois State Police, accompanied by Agent Robinson, conducted a gambling raid at the VFW. After the raid, CUETO would and did assist VENEZIA in composing a fictitious letter to the St. Clair County State's Attorney Robert Haida falsely attacking Agent Robinson for an attempted bribery solicitation of Venezia. CUETO hand-delivered the fictitious letter to Haida on August 28, 1992;

e) On the same day CUETO would and did request a judge at the St. Clair County courthouse to enter an order in the case , requiring Agent Robinson to appear for a hearing on a "Motion to Dismiss" scheduled for September 1, 1992 when in truth and in fact, no such motion to dismiss had been filed in the case;

f) On September 1, 1992, CUETO met with defendants VENEZIA and ROMANIK, and then Mayor of Washington Park, Sylvester Jackson, at CUETO's law offices and, consistent with ROMANIK's earlier suggestion, CUETO would and did state that they would "get Agent Robinson

before he got them." With the help of ROMANIK, CUETO located Robinson at the St. Clair county courthouse. Robinson, believing that he was there for the case, was served with a notice by ROMANIK to appear within minutes in Judge Radcliffe's courtroom for an injunction hearing in the case , Cause No. 92-CH-299. At the hearing, CUETO objected to Robinson's request for an attorney and then forced Robinson to disclose the existence of the secret FBI investigation of VENEZIA and B&H. Robinson was forced to disclose that he had been working undercover for the FBI and, at the FBI direction, that Agent Robinson had recorded the August 17th bribery attempt by VENEZIA. During the hearing, VENEZIA falsely testified under oath that he was an honest businessman in the general vending business who had been solicited and threatened by Robinson. Judge Radcliffe then entered an injunction against Robinson. VENEZIA later boasted to other members of the racketeering enterprise about CUETO's "ball bat tactics" in the courtroom.

27. It was a further part of the conspiracy that after the forced disclosure at the injunction hearing of the FBI criminal investigation of the B&H gambling racket, VENEZIA would and did impede and attempt to impede the FBI investigation by using the injunction entered against Robinson to persuade the VFW to replace the illegal gambling machines and to continue to operate the illegal gambling business.

28. During the conspiracy the case, No. 92-CH-299 was transferred from the state court in St. Clair county to the federal district court in the case of , Cause No. 92-CV-867. The federal district court dissolved the state court injunction noting numerous irregularities in the

legal procedure employed by CUETO in that state court proceeding.

29. It was a further part of the conspiracy that CUETO and VENEZIA would and did appeal the federal district court decision dissolving the injunction against Agent Robinson to the Seventh Circuit Court of Appeals.

30. It was a further part of the conspiracy that as part of the appeal, CUETO would and did file a false pleading in the Court of Appeals to protect himself and VENEZIA from possible obstruction charges by falsely claiming that State's Attorney Robert Haida had contrived the use of the fictitious court order in the case as pretext to lure Robinson to the injunction hearing under false pretenses when in truth and in fact, the State's Attorney never knew of or approved CUETO's plan to lure Robinson under false pretenses to the courthouse on September 1, 1992.

31. During the conspiracy, the United States Court of Appeals for the Seventh Circuit rejected CUETO's appeal and referred the state court judge for disciplinary proceedings and affirmed that CUETO had engaged in legal irregularities.

32. It was further part of the conspiracy that CUETO, on behalf of VENEZIA, would and did appeal the appellate court's decision to the United States Supreme Court and file a false pleading realleging the phone Haida story and which pleading attacked the integrity of the judges on the Court of Appeals claiming, among other things, that the federal appellate court judges had "vilified" VENEZIA. The Supreme Court refused the appeal.

33. It was a further part of the conspiracy that CUETO, VENEZIA, ROMANIK and others would and did engage in a series of acts to attack the discredit Agent Robinson in an effort to prevent him from participating in the continuing federal criminal investigation of VENEZIA and B&H, including but not limited to the following:

a) in or about October 1992, CUETO would and did instruct ROMANIK and VENEZIA to make an unannounced visit to a B&H customer who had been arrested by local law enforcement and confessed in a written statement to charges of gambling. ROMANIK would and did persuade the tavern owner to sign the new statement, handwritten by ROMANIK, claiming that Agent Robinson had coerced the prior confession when in truth and in fact Robinson did not coerce the confession.

b) On October 28, 1992, CUETO would and did attach the tavern owner statement prepared by ROMANIK to a letter sent to the FBI, the United States Attorneys Office and other law enforcement agencies wherein CUETO falsely claimed that VENEZIA was an honest businessman and CUETO would and did threaten to sue Agent Robinson and the Illinois Liquor Commission for millions of dollars in damages if Robinson was allowed to continue his investigative efforts against VENEZIA's business.

c) ROMANIK would and did testify before the 1994-1 federal grand jury that he had "no recollection of" and "didn't know" the reason that CUETO sent him and VENEZIA in October 1992 to interview the B&H customer when in truth and in

fact ROMANIK attempted to impair and obstruct the grand jury's efforts to investigate by failing to disclose facts then known to ROMANIK.

d) ROMANIK would and did testify before the 1994-1 federal grand jury that he had no recollection of the reason that he accompanied CUETO and VENEZIA to the courthouse on September 1, 1992 to serve Robinson with a notice of hearing in the case when in truth and in fact ROMANIK attempted to impair and obstruct the grand jury's efforts to investigate by failing to disclose facts then known to ROMANIK.

34. It was a further part of the conspiracy that in or about July 1993, CUETO became VENEZIA's silent partner in Club Exposed out of which VENEZIA operated the illegal B&H gambling business.

35. During the conspiracy, on or about July 20, 1993, B&H received a grand jury subpoena to produce its business records in connection with the grand jury investigation of the illegal gambling business.

36. It was a further part of the conspiracy that three days after the issuance of the B&H grand jury subpoena, CUETO would and did appear at a hearing convened in the St. Clair County courthouse in the case , which case arose out of an arrest of a B&H customer for illegal gambling [hereinafter the "Vogt hearing"].

37. It was a further part of the conspiracy that CUETO's law firm would and did represent Vogt and continue to represent other B&H customers arrested for illegal gambling during the time that CUETO had an interest in the profits of Club Exposed which profits were derived from the illegal gambling business.

38. It was a further part of the conspiracy that in violation of the Illinois Rules of Professional Conduct CUETO would and did represent multiple clients with conflicting legal interests at the Vogt hearing.

39. It was a further part of the conspiracy that CUETO would and did falsely advise the state court judge at the Vot hearing that a witness had advised his law partner, Tom Daley, that Agent Robinson had demanded money from the witness when in truth and in fact CUETO's law partner was never told this by the witness.

40. It was a further part of the conspiracy that CUETO would and did deliver a transcript of the Vogt hearing to State's Attorney Haida with the demand that Haida charge Agent Robinson with the crime of perjury for denying at the Vogt hearing that Robinson had received money from the witness.

41. It was a further part of the conspiracy that on January 21, 1994 and June 15, 1994, CUETO would and did send letters to pressure Haida to criminally prosecute Robinson for a crime that Robinson did not commit.

42. It was a further part of the conspiracy that on January 10, 1995, Cueto would and did announce his intention to oppose Haida in election for the office of St. Clair County State's Attorney after Haida refused to prosecute Robinson for a crime that Robinson did not commit.

43. It was further a part of the conspiracy that in January 1995 CUETO caused to be published through the Century Printing Company, a newspaper tabloid known as the East Side Review which he then caused to

be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did threaten by intimidation in the East Side Review that he would prosecute Robinson if CUETO won the election for State's Attorney.

44. It was a further part of the conspiracy, that at or about the time that VENEZIA was indicated in the racketeering case in March 1995, in an effort to guarantee CUETO's electoral victory for the office of state's attorney, CUETO would and did cause his undisclosed business partner, then a public official, to contact State's Attorney Haida and offer to use his political influence to facilitate Haida's appointment to a judgeship in the St. Clair county courthouse if Haida would agree to persuade the county board chairman to appoint CUETO as the new state's attorney to fill Haida's vacancy.

45. It was a further part of the conspiracy that in November 1994, federal grand jury subpoenas were issued by the 1994-1 grand jury to certain VFW employees in connection with the VENEZIA criminal gambling investigation. VENEZIA would and did drive the witnesses to CUETO's law offices where CUETO advised the witnesses that he could "take care of it" so that they would not have to testify before the grand jury.

46. It was a further part of the conspiracy that CUETO would and did file false and groundless motions to discharge the 1994-1 grand jury and for sanctions in an effort to impede and obstruct the grand jury proceedings which motions also attacked the FBI and United States Attorneys' Office.

47. It was a further part of the conspiracy that, in violation of the Illinois Code of Professional Responsibility, Cueto would and did represent multiple clients

with conflicting legal interests in connection with the 1994-1 grand jury proceedings and file false pleadings in the District Court.

48. It was a further part of the conspiracy that on December 6, 1994, federal agents of the Federal Bureau of Investigation and the Internal Revenue Service seized approximately 170 video gambling machines supplied by B&H to the bar owners at approximately 27 locations in the metro east St. Louis area, including topless bars owned and operated by VENEZIA. Within days of the gambling seizures, CUETO would and did instruct VENEZIA to replace the gambling machines "otherwise it would be like admitting guilt," which instructions attempted to impede the efforts of the FBI to dismantle the illegal gambling enterprise and the efforts of the 1994-1 grand jury investigating the criminal enterprise.

49. It was a further part of the conspiracy that CUETO would and did counsel VENEZIA to replace the gambling machines in violation of the Illinois Rules of Professional Conduct that prohibit an attorney from engaging in criminal conduct with a client.

50. It was a further part of the conspiracy that VENEZIA would and did replace the gambling machines at Club Exposed and continue to operate the illegal gambling business during 1995 in the months immediately following the federal gambling raid.

51. It was a further part of the conspiracy that VENEZIA would and did make three $5,000 cash payments to CUETO in early 1995 after the federal gambling raids for CUETO's share of the profits from Club Exposed.

52. It was a further part of the conspiracy that in July 1994, CUETO and his undisclosed business partner, then a public official, met at CUETO's office and would and did discuss, with the deal promoters in the DKCO casino transaction, the status of a pending bill in Congress to recognize one of the Indian tribes involved in the DKCO deal.

53. It was a further part of the conspiracy that VENEZIA's participation in the DKCO deal was concealed in the paperwork and his interest was held by a nominee. Within days of the federal gambling raids to dismantle the B&H gambling business, the DKCO deal collapsed.

54. It was a further part of the conspiracy that IllArt was funded in part with money supplied by B&H.

55. It was a further part of the conspiracy that in or about February 1995, ROMANIK was subpoenaed to testify before the 1994-1 federal grand jury investigating the illegal gambling enterprise. ROMANIK would and did impair and impede and attempt to impair and impede the proceedings before the 1994-1 grand jury by repeated testimony that he had "no recollection" and "didn't know" in response to approximately 150 questions when in truth and in fact ROMANIK engaged in a pattern of conduct to avoid disclosing facts then known to ROMANIK.

56. It was a further part of the conspiracy that after VENEZIA, B&H and others were indicted by the 1994-1 grand jury on March 30, 1995 in the racketeering case, CUETO would and did pay $50,000 in legal fees to VENEZIA's defense lawyer.

57. It was a further part of the conspiracy that during the pre-trial phase of the prosecution, CUETO would and did prepare false and groundless court papers and motions attacking the federal district court judge to whom the racketeering case had been assigned, which pleadings VENEZIA demanded that the defense lawyers file in the racketeering case.

58. It was a further part of the conspiracy that the false court papers were used to attempt to disrupt and impede the trial and prosecution of VENEZIA, B&H and others in the racketeering case in the federal district court.

59. It was a further part of the conspiracy that when a defense lawyer in the racketeering case would refuse to file CUETO's false and vexatious court papers in the federal district court, CUETO would and did deliver, through VENEZIA, copies of the Illinois Rules of Professional Responsibility in an effort to coerce the attorneys to file the pleadings.

60. It was a further part of the conspiracy that CUETO would and did draft and deliver through TOM VENEZIA, a letter for Sandra Nations Venezia to sign, which letter advised her defense lawyer that he would be fired if he refused to file CUETO's false court papers in the racketeering case. Thereafter, the lawyer was fired.

61. It was a further part of the conspiracy that during the trial of the racketeering case, CUETO would and did prepare instructions and written demands for delivery to defense counsel which instructions included witness examination questions and evidentiary materials for admission at trial to protect CUETO's own interests in avoiding future prosecution.

62. It was a further part of the conspiracy that CUETO would and did threaten attorneys at the Illinois Attorney Registration and Disciplinary Commission with criminal prosecution, if he became elected as State's Attorney, for performing their lawful function of investigating the written confession of a co- defendant in the racketeering case that implicated CUETO's participation in the racketeering case.

In furtherance of the conspiracy and to effect the objects thereof, the defendants and their co-conspirators did engage in the following:

OVERT ACTS

a) On August 28, 1992, CUETO hand delivered a letter signed by VENEZIA to State's Attorney Haida falsely accusing Agent Robinson of soliciting bribes;

b) On August 28, 1992, CUETO obtained a fictitious court order in the case;

c) On September 1, 1992, VENEZIA testified falsely under oath at the injunction hearing that he was "just in the general vending business";

d) On October 28, 1992, CUETO caused to be delivered to the FBI and other state and federal law enforcement agencies, a letter attaching the ROMANIK and VENEZIA interviews which letter erroneously accused Robinson of misconduct;

e) In or about August 1993, CUETO delivered the Vogt transcripts to State's Attorney Haida to persuade the state's attorney to prosecute Agent Robinson;

f) On January 21, 1994, CUETO caused to be delivered to State's Attorney Haida a letter demanding the criminal prosecution of Agent Robinson;

g) On June 15, 1994, CUETO caused to be delivered to State's Attorney Haida a letter again demanding Agent Robinson's prosecution;

h) In or about December 1994, VENEZIA replaced the gambling machines seized by FBI agents on the advice of CUETO, including at the Club Exposed niteclub;

i) In or about January 1995, VENEZIA made a $5,000 cash payment to CUETO;

j) In or about February 1995, VENEZIA made a $5,000 cash payment to CUETO;

k) In or about March 1995, VENEZIA made a $5,000 cash payment to CUETO;

l) On February 22, 1995, ROMANIK testified before the federal grand jury and denied recollection or knowledge in response to approximately 150 questions;

m) In or about January 1995, CUETO publicly threatened by intimidation in his tabloid, the East Side Review, to prosecute Robinson if he was elected states attorney;

n) In or between January 1995 and January 1996, CUETO's company, the 1967 Corporation, would and did pay $215,000 to Century Printing for publication of the East Side Review.

o) In or about April 1995, a meeting was set up with State's Attorney Haida to persuade him to vacate his office and create a vacancy for Cueto;

p) In or about July 1995 CUETO prepared and filed a false pleading on behalf of another in the racketeering case;

q) On or about July 19, 1995, Milan Venezia's attorney received a fax from B&H with purported instructions from Milan to his attorney to file certain pleadings in the racketeering case, however, the fax was false in that Milan was already cooperating with the federal government in the racketeering case and never issued those instructions to his lawyer;

r) On or about July 19, 1995, the same pleadings were delivered to Sandra Nations Venezia's defense attorney who refused to file false pleadings;

s) On or about July 19, 1995, Sandra's defense attorney met with defendant TOM VENEZIA and others at which meeting TOM VENEZIA ordered Sandra's lawyer to file the pleadings;

t) Sandra's lawyer refused to file the pleadings and in response, TOM VENEZIA telephone CUETO to report the refusal to file pleadings which Sandra had identified as having been CUETO's idea;

u) CUETO thereupon faxed a portion of the Illinois Rules of Professional Responsibility to TOM VENEZIA's office with portions underlined in an attempt to coerce Sandra's attorney to file the pleadings;

v) On or about July 20, 1995, CUETO caused a draft letter to be faxed for Sandra Venezia to fire her defense lawyer in the racketeering case;

w) CUETO advised TOM VENEZIA to divorce Sandra Nations Venezia and marry Erin Griffin in a sham marriage to prevent Griffin from testifying against TOM VENEZIA at a subsequent trial.

All in violation of Title 18, United States Code, Section 371.

COUNT 2
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

63. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

64. In or about and between January 1992 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in , cause no. 92-CV--867 in the United States District Court for the Southern District of Illinois, on appeal in cause no. 93-2448 in the Seventh Circuit Court of Appeals, and on appeal in cause no. 93-1929 to the United States Supreme Court by filing or causing to be filed false pleadings in connection with those proceedings.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 3
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

65. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

66. In or about and between January 1992 and continuing through early 1995, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1994-1 federal grand jury in the Southern District of Illinois by instructing Melvin Swanson that it was unnecessary for Swanson to appear in response to a grand jury subpoena and testify in the ongoing grand jury investigation of the B&H gambling racketeering case, by offering to "take care of it" for Swanson, by counselling him to assert his Fifth Amendment privilege against self incrimination, and by offering to provide

Swanson with an attorney to represent him in that investigation;

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 4
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

67. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

68. In or about and between 1994 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others known and unknown to the grand jury did corruptly endeavor to influence the due administration of justice in the 1994-1 federal grand jury for the Southern District of Illinois by CUETO instructing VENEZIA to replace the gambling machines after the federal gambling raid "otherwise it would be like admitting guilt."

69. In an effort to conceal his own participation in the attempted obstruction, CUETO later ordered VENEZIA's defense attorney to remove statements from pleadings filed in the racketeering case on VENEZIA's behalf that disclosed that CUETO had in fact instructed VENEZIA to replace the seized gambling machines.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 5
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

70. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

71. In or about 1994 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendant

ROBERT ROMANIK

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1994-1 federal grand jury in the Southern District of Illinois by repeated and evasive testimony before the grand jury in response to approximately 150 questions that he had "no recollection" or "didn't know" when in truth and in fact ROMANIK engaged in a pattern of conduct to avoid disclosing facts then known to ROMANIK.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 6
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

72. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

73. In or about 1993 and continuing through the present, both dates being approximate and inclusive in

St. Clair County in the Southern District of Illinois and elsewhere, the defendant

AMIEL CUETO

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1994-1 federal grand jury in the Southern District of Illinois and in the racketeering case, , cause no. 95-30024 in the United States District Court for the Southern District of Illinois by CUETO engaging in acts to persuade the St. Clair County State's Attorney to indict Agent Robinson, including by offering and causing to be offered a judicial position as a political favor to Haida to permit CUETO to fill the vacancy and indict Robinson.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 7
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

74. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

75. In or about 1993 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendant

AMIEL CUETO

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the rack-

eteering case, , cause no. 95-30024 in the United States District Court for the Southern District of Illinois by preparing and filing and causing to be prepared and filed false pleadings and court papers in the federal district court.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 8
CONSPIRACY TO OBSTRUCT JUSTICE
18 USC § 371

76. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

77. It was within the authority of the 1995-1 federal grand jury, duly empaneled in the Southern District of Illinois, to investigate and return criminal indictments for, among other crimes, violations of the federal obstruction and perjury statutes.

78. It was within the authority of the 1995-1 grand jury to investigate conduct engaged in by the defendants and their co- conspirators aimed at defrauding the government by impairing, impeding and obstructing lawful governmental functions and any attempt to do so in connection with the investigation and prosecution of the racketeering case.

79. Subsequent to the convictions in the racketeering case, the 1995-1 federal grand jury commenced such an investigation and issued or caused to be issued grand jury subpoenas for testimony and documents for at least that purpose.

THE CONSPIRACY

80. In or about and between January 1, 1995 and continuing through the present, both dates being approximate and inclusive, in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others, known and unknown to the grand jury, did unlawfully, knowingly, and intentionally combine, conspire, and agree to corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1995-1 federal grand jury in the Southern District of Illinois in violation of Title 18, United States Code, Section 1503.

81. An objective of the conspiracy was to interfere with the grand jury's investigation, after the conviction of VENEZIA and others, regarding whether the defendants had engaged in a corrupt endeavor to influence, impede or obstruct the investigation and criminal prosecution of the racketeering case in violation of 18 U.S.C. §1503. In an effort to interfere with this investigation of other criminal conduct occurring prior to, during and after the convictions in the racketeering case, among other things, false testimony was given to the grand jury and witnesses were counselled not to disclose evidence to the grand jury.

MANNER AND MEANS OF THE CONSPIRACY

82. It was a part of the conspiracy that TOM VENEZIA would and did threaten Sandra Nations Venezia that if

she cooperated with the government and "hurt him or Cueto" that she would be cut off financially;

83. It was a further part of the conspiracy that after the conviction in the racketeering case VENEZIA would and did advise Sandra Nations Venezia to contact CUETO about getting financial help for her. At or about this time, Sandra Nations Venezia advised VENEZIA that she had received a subpoena to appear before the 1995-1 grand jury;

84. It was a further part of the conspiracy that CUETO would and did contact Sandra Nations Venezia and advised her that VENEZIA had asked CUETO to deliver money to her because she had not received any money since VENEZIA was incarcerated;

85. It was a further part of the conspiracy that shortly before her appearance at the grand jury, CUETO and Sandra Nations Venezia would and did meet in CUETO's car at which time CUETO delivered $6,500 in cash and advised Sandra Nations Venezia that $6,000 was for her and $500 was to be delivered to VENEZIA in jail.

86. It was a further part of the conspiracy that CUETO advised Sandra Nations Venezia that she need not disclose the $6,500 cash payment received from CUETO to the grand jury.

87. It was a further part of the conspiracy that TOM VENEZIA would and did appear before the 1995-1 grand jury and testify falsely to conceal CUETO's secret ownership interest in Club Exposed, where B&H operated the illegal gambling business, and to conceal that CUETO received cash payments in connection with Club Exposed.

In furtherance of the conspiracy and to effect the objects thereof, the defendants and their co-conspirators did engage in the following:

OVERT ACTS

a) In or about January 1996 CUETO delivered a $6,500 cash payment to Sandra Nations Venezia;

b) On January 19, 1996, VENEZIA denied in the grand jury that CUETO was his partner in Club Exposed;

c) On January 19, 1996, VENEZIA denied in the grand jury making $5,000 cash payments to CUETO in the early part of 1995;

All in violation of Title 18, United States Code, Section 371.

COUNT 9
PERJURY
18 USC §§ 1623 AND 2

88. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

89. Defendant VENEZIA, testified under oath before the grand jury in connection with the aforementioned investigation of obstruction in connection with the racketeering case. It was material to the grand jury's investigation to determine whether, among other things, an attempt had been made to impede Agent Robinson in the performance of his duties in connection with the racketeering case and whether the defendants had valuable mutual business interests which would pro-

vide a motive for the defendants and others to endeavor to obstruct the dismantling of the gambling business and the prosecution of the racketeering case to protect those business interests and the financial viability of their business partners.

90. On or about January 19, 1996, within the Southern District of Illinois, the defendant,

THOMAS VENEZIA

having taken an oath that he would testify truthfully before a duly empaneled grand jury of the United States, did knowingly, wilfully and contrary to his oath, make false and material declarations before the grand jury, which are hereinafter set forth in the statements underlined:

*****

Q: And did you have video gambling machines in the club Exposed?

A: Yes, ma'am.

Q: And did customers come into the club Exposed and play and win credits on those machines and get paid off by the bartender?

A: Yes.

Q: Now, who was your partner in Club Exposed?

A: *I have no partner.*

Q: Did you have any investors in Club Exposed?

A: No.

Q: Who owned Club Exposed?

A: Bob Romanik owned the property, and I was buying it bond for deed.

Q: And who operated, who owned the business of Club Exposed?

A: Tom Venezia.

Q: And were there any other investors in Club Exposed other than yourself?

A: No.

Q: Was Amiel Cueto a silent partner in Club Exposed?

A: *Absolutely not.*

Q: Did Amiel Cueto have any monetary interest whatsoever in Club Exposed?

A: *None.*

Q: Did you ever make cash payments to Amiel Cueto for his share of profits from Club Exposed?

A: *Never.*

Q: Did you instruct Sandra Nations Venezia to put $5,000 in an envelope in or about January of 1995 to pay to Amiel Cueto?

A: *Never.*

Q: Did you instruct Sandra Nations Venezia in or about February 1995 to put $5,000 in an envelope to give to Amiel Cueto?

A: Isn't that the same question you just asked me?

Q: No. The first question was for January of 1995. The second would be in or about February of 1995.

A: *No, ma'am..*

Q: And did you ever take an envelope in or about January of 1995 containing $5,000 in cash and give it to Amiel Cueto?

A: *Never.*

Q: In or about February of 1995, did you ever take an envelope containing $5,000 in cash and give it to Amiel Cueto?

A: *No.*

Q: At any time in connection with the operation of Club Exposed, did you ever pay any cash to Amiel Cueto?

A: *No.*

Q: To your knowledge, did Amiel Cueto ever participate in any loan transactions involving Club Exposed?

A: He and I borrowed that million dollars.

Q: From Magna Bank?

A: From Magna Bank. And he was on that loan with me. And part of that money was used to build Club Exposed.

Q: With his knowledge and consent?

A: Yes.

*****

91. The underlined testimony by the defendant THOMAS VENEZIA, as he then and there well knew, believed and remembered, was false because the defendant THOMAS VENEZIA knew that in truth and in fact

(a) CUETO was a silent business partner in Club Exposed, and (b) that VENEZIA had made $5,000 cash payments to CUETO in connection with Club Exposed in early 1995.

All in violation of Title 18, United States Code, Sections 1623 and 2.

A TRUE BILL
/s/_____
FOREPERSON

/s/ W. Charles Grace

W. CHARLES GRACE

United States Attorney

Recommended Bond: Amiel Cueto - $25,000 unsecured

Thomas Venezia – serving sentence

Robert Romanik - $25,000 unsecured

APPENDIX H

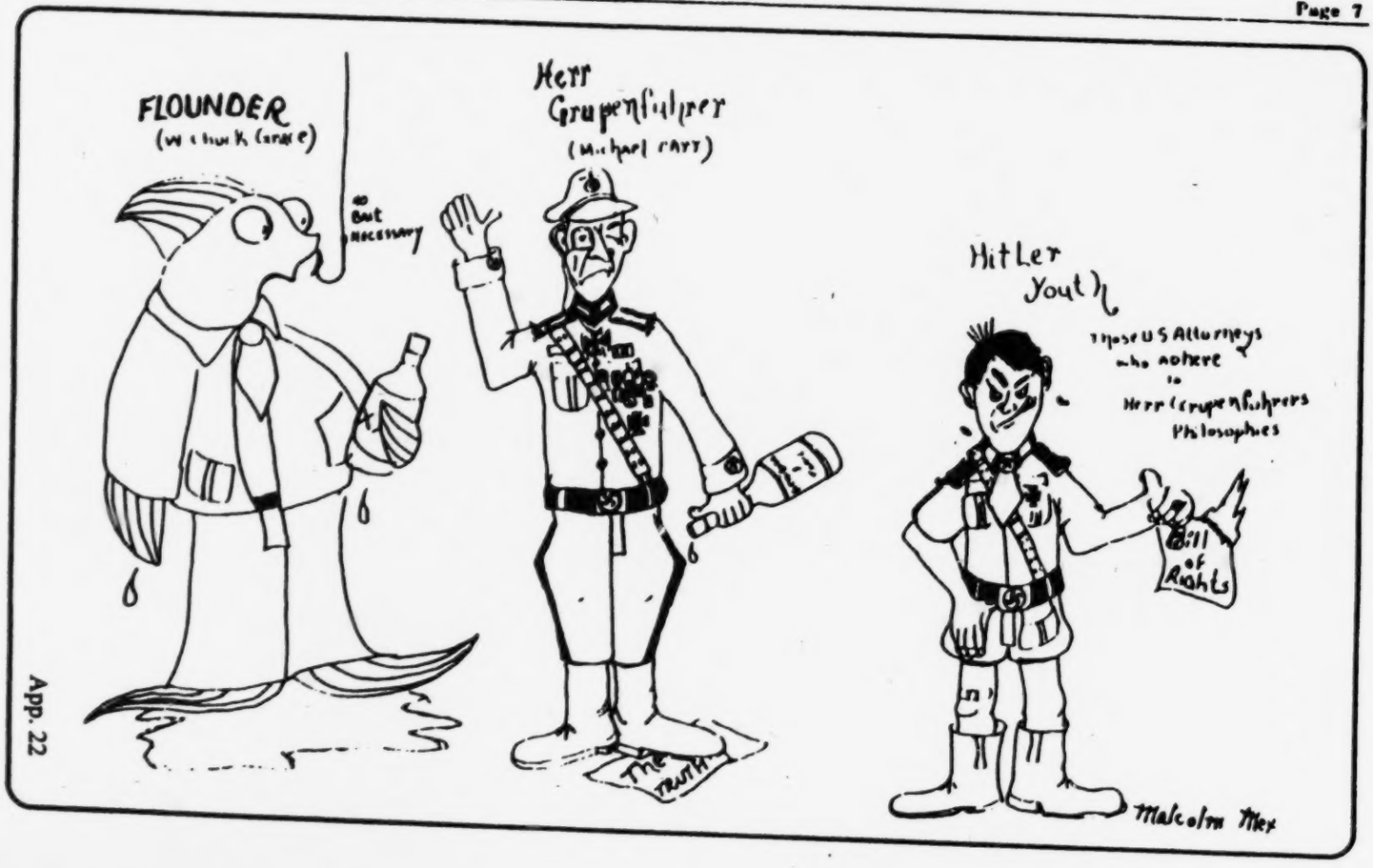
News, Analysis and Opinion From A Different Perspective

East Side Review

Volume V
March 6, 1995

An Independent, Freedom Newspaper
Serving Metro East and Southern Illinois

50¢



APPENDIX I

U.S. Department of Justice
United States Attorney
Southern District of Illinois
Nine Executive Drive Suite 300
Fairview Heights, Illinois 62208
(618) 628-370

May 2, 1995

Ms. Mary Robinson
Administrator
Attorney Registration
Disciplinary Commission
One Prudential Plaza 130
East Randolph Drive; Suite 1500
Chicago, IL 60601
Re: Attorney Amiel Cueto

Dear Ms. Robinson:

Please be advised that during the course of a year-long grand jury investigation into video gambling, racketeering, public corruption and tax violations, recently a cooperating witness for the government has submitted a proffer and subsequent testimony including allegations of attorney misconduct and criminal violations on the part of the above-referenced licensed attorney at law. This letter and enclosures are submitted to the Commission pursuant to our ethical obligation.

Enclosed herewith is the Statement of Facts accompanying the plea of guilty of Mayor Sylvester Jackson, Mayor of Washington Park, Illinois, which is a matter of public record. The testimony given by Mayor Jackson was before the federal grand jury and is therefore confidential.

In addition, enclosed is a copy of the Seventh Circuit Court of Appeals opinion previously issued, which is pertinent to any inquiry as background and verification for one of the occurrences alleged in the Statement of Facts.

Also enclosed are copies of pertinent editions of the bimonthly newspaper, *The East Side Review*, which is published by a corporation established by Mr. Cueto and which has been published every two weeks since the Seventh Circuit Court of Appeals pronouncement. These copies contain statements believed to be written by Mr. Cueto, which pertain to the matter at hand.

Concerning any investigation, our office would prefer that any investigation you may begin be placed on hold after your responsive statement is received from the subject. In the event this is problematic, please do not hesitate to call either myself or the United States Attorney Criminal Division Chief, Michael Carr to discuss this aspect.

Thank you.

Very truly yours,
/s/ W. Charles Grace
W. CHARLES GRACE
United States Attorney

WCG/cmr Enclosures

COPY

U.S.
D
931929 MAY 31 1994
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

Term: October, 1993

THOMAS VENEZIA,

Plaintiff-Petitioner,

v.

BONDS ROBINSON, JR.,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMIEL CUETO
Counsel of Record
7110 West Main St.
Belleville, IL 62223
(618) 277-1554

GOVERNMENT
EXHIBIT
85-12

APPENDIX J

The letter to State's Attorney Haida was hand-carried to him by Venezia's lawyer - Amiel Cueto. (R. 12, Exh. 2, pp. 46–47) Cueto delivered the letter to Haida at Haida's office on August 28, 1992, and Cueto and Haida discussed Robinson's bribe and extortion plot; they decided that Haida would call Robinson to the courthouse on September 1, 1992, on the pretext of a hearing, so that Cueto could subpoena Robinson to testify in the chancery court on that day; and that in fact was done. (R. 12, Exh. 2, p. 4) Robinson was served with both a subpoena and a Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. (R. 12, Exh. 2, p. 6) An evidentiary hearing was held, and at the conclusion the state court issued a preliminary injunction (R.2)

Why would the court of appeals report this false statement about Tom Venezia?

The above statements by the Seventh Circuit Court about Tom Venezia are false, malicious (that is, published with knowledge that the statements were false), and defamatory. Why would the court

say these outrageous things? One wonders whether there is something going on here other than the scholarly resolution of legal issues. Which leads to the argument on this point.

CONCLUSION

The State's Attorney and Venezia's lawyer together agreed on a plan to stop Robinson's extortion, and the State's Attorney called Robinson to the courthouse on a pretext. This was done on September 1, 1992, in order to set Robinson up for Venezia's preliminary injunction hearing.

APPENDIX K

CUETO, CUETO & CUETO, Ltd.
ATTORNEYS AT LAW
7110 WEST MAIN STREET
BELLEVILLE. ILLINOIS 62223
AMIEL CUETO • LLOYD CUETO
CHRISTOPHER CUETO • MICHAEL S. WILLIAMS
(618) 277-1554 (618) 398-1554
(314) 241-2592 FAX (618) 277-0962

January 21, 1994

Mr. Robert Haida
State's Attorney
St. Clair County Building
10 Public Square
Belleville, IL 62220

Dear Bob:

I hate to be a pest, but we are reaching critical mass in the Bonds Robinson, Jr. case. There reaching a number of civil matters that have to be resolved (including an appeal in U.S. Seventh Circuit Court), and I have to move. I can got the deposition of Tony Joynt. He will have to admit when he's under oath that he delivered money to Robinson (although Joynt has told people that this money was for a loan). In any case Robinson has set himself up for numerous counts of perjury. I would ask you to please move on this no later than February 18, 1994, which is four weeks from the day you receive this. If that is a problem, please give me a call. I think that if we have to, I can proceed on the civil matters without prejudicing your criminal case.

Very truly yours,
CUETO, CUETO & CUETO, LTD.
/s/ Amiel Cueto
AMIEL CUETO

AC/jk

CUETO, CUETO & CUETO, Ltd.
ATTORNEYS AT LAW
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BELLEVILLE. ILLINOIS 62223
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(314) 241-2592 FAX (618) 277-0962

June 15, 1994

Mr. Robert Haida
State's Attorney
St. Clair County Building
10 Public Square
Belleville, IL 62220

Dear Bob:

Enclosed please find pages 45-52 of the transcript in People v. Voct, testimony taken on July 23, 1993. 1 have marked in red thirteen answers given by Bonds Robinson, Jr., each one of which was false. Robinson was under oath and knew the testimony he gave was false. This is not the only perjury by Robinson, but it is a start. As Tony Joynt's lawyer told you, Tony will testily if he is compelled to, that he loaned Robinson $500.00, and that he "bought* pantyhose from Robinson's wife. Tony will claim the Fifth Amendment, however these loans and purchases are beyond the statute of limitations; moreover Tony did nothing wrong. If anything, he was a victim of Bonds Robinson's remorseless extortion.

Bob, when we discussed this last October, I thought we agreed that you would call Tony- to the Grand Jury in November or December. in cur discussion last week,

you told me that that would be done in July (next month). I would ask you to please keep me informed. It is very important to my client's legal position that Robinson be- brought to justice as soon as possible. If you need anything else from me, please give me a call.

Very. truly yours,

CUETO, CUETO & CUETO, LTD.
/s/ Amiel Cueto
AMIEL CUETO

AC/js Enclosures

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff/Respondent,
V.
AMIEL CUETO,
Defendant/Petitioner.

No. 99-83 1-SNL FILED 00 JUL 28 AM 10:54

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF§2255 RELIEF BASED UPON THE RECENTLY DECIDED U.S. SUPREME COURT DECISIONS OF *UNITED STATES V. HUBBELL*, No. 99-166,530 U.S. (2000) *APPRENDI V. NEW JERSEY* No. 99-478 (2000 WL 807189)

On June 5, 2000, some four days after this court permitted oral argument on the petitioner's §2255 claim, the United States Supreme Court decided the case of *United States v. Hubbell* No. 99-166, 5 3 0 U.S. (2000). This case is foursquare on point with the case at bar and requires a new trial for Cueto; and before that new trial occurs it should be preceded by what is commonly known as a *Kastigar* hearing.

The facts in *Hubbell* are eerily similar to the case at bar. Webster Hubbell was compelled, after a grant of immunity, to respond to a subpoena duces tecum calling for I I categories of materials, which ultimately required the production of 13,120 pages of documents. He was further required to answer a series of questions estab-

lishing that these produced materials were all of the documents in his custody and control responsive to the subpoena. These compelled disclosures by Hubbell led to his indictment. *Hubbell*, Slip Op. at p. 3.

The Supreme Court's reasoning as to why the production of these thousands of pages of materials to the government, coupled with Hubbell's acknowledgment that he made a full disclosure, was a "testimonial" act sufficient to invoke the Fifth Amendment's protection against self incrimination directly applies to the issue at bar and deserves an extended quote:

> It is apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources. See Appendix infra. Given the breadth of the description of the I I categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" an individual or member of his family during a three year period is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of questions at a discovery deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents

> fitting within any of the I I broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence" or "a fink in the chain of evidence needed to prosecute." *Hubbell*, Slip Op. at p. 13-14.

In describing the "testimonial" nature of Hubbell's compelled response, the Supreme Court recoiled from an assertion the Constitution does not offer protection:

> It was unquestionably necessary for respondent to make extensive use of "the contents of his own mind" in identifying the hundreds of documents responsive to the requests in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The Government's anemic view of respondent's act of production as a mere physical act that is principally non-testimonial in character and can be entirely divorced from the "implicit" testimonial aspect so as to constitute a "legitimate wholly independent source" (as required by *Kastigar*) for the documents produced simply fails to account for these realities. *Hubbell* Slip Op. p. 15-16, Citations Omitted.

This holding could have been written for the *Cueto* case. The language applies directly to the issue of the "Grace-letter", with respect to both the government's subterfuge in compelling Cueto to respond, and to the government's concealment of the document in discovery.

After receipt of the "Grace letter by the Administrator of the ARDC, the Defendant was compelled to respond to six broadly worded interrogatories calling for "the

contents of his own mind" regarding his knowledge and participation in the dealings of Thomas Venezia as well as the production of "any and all employment contracts, fee agreements, correspondence, notes and memoranda" relating to the interrogatories propounded. (See Exhibit 8 in petitioner's original appendix.) The Supreme Court condemned the subpoena to Hubbell as the functional equivalent of a set of interrogatories, to which Hubbell had been required to respond. In the case at bar, the "Grace letter prompted actual written interrogatories.

In response to the "Grace letter", Cueto was required to produce a 42 page single spaced narrative statement, along with approximately 2,300 pages of documentary materials. Even Hubbell was not required to produce, as was the defendant here, a detailed first person narrative statement. And just as in *Hubbell* the government used Defendant-Cueto's compelled disclosures to frame his indictment. See, for example, paragraph 62 of the Indictment at bar wherein the government charged that Defendant-Cueto's compelled response to the Administrator of the ARDC was itself a criminal act.

Moreover in Defendant-Cueto's case, the government went still further, introducing his compelled disclosure into evidence at his criminal trial and having one of its experts, James Grogan, rely upon it for his opinions.[1] At the oral argument of the Defendant's §2255 claim before this court on June 1, 2000, the government contended that Defendant's motion should be denied because the government had used at trial only a few excerpts from the compelled statement. *Hubbell* squarely refutes this:

---

[1]Government Exhibit 40 was, in heavily redacted form, Cueto's compelled statement admitted against him. Grogan's testimony, certainly adverse to the Defendant, regarding Exhibit 40 may be found at trial transcript, Volume 22, pages 157-160.

> The question, however, is not whether the response to the subpoena may be introduced into evidence at his criminal trial. That would surely be a prohibited "use " of the immunized act of production. *Hubbell* Slip Op. at p. 13, Italics added. Citation Omitted.

The undisputed fact that the Government used, directly, Cueto's compelled disclosure against him at his criminal trial requires, under *Hubbell* a new trial for the Defendant at this time. However, *Hubbell* requires that before such a new trial occurs the Defendant be granted a *Kastigar* hearing to determine the extent of the "derivative use" of the prohibited evidence. If the Government cannot meet its heavy burden at such a hearing, the Indictment, as in *Hubbell* must be dismissed without the new trial occurring (which makes what happened in the Oliver North case):

> But the fact that the Government intends no such use [direct admission into evidence] of the act of production leaves open the separate question whether it has made 'derivative use' of the testimonial aspect of that act in obtaining the indictment against a respondent and in preparing its case for trial. *Hubbell* slip op. at p. 13. Italics added.

The government clearly made prohibited 'derivative use' of the Defendant's compelled disclosure in framing the charges brought against him (see, for example, paragraph 62 of the Indictment); and in preparing its witnesses, including James Grogan (an expert on "ethics"), Reginald Joseph (an FBI agent permitted to offer expert opinions), Jack Dorgan (the head of the Illinois Liquor Control Commission), Robert Haida, Sylvester Jackson, Sandra Nations, and Thomas Venezia. Such 'derivative use' of compelled disclosures is improper

under the Fifth Amendment and *Kastigar*, as *Hubbell* makes clear:

Kastigar requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to used at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena. The Government, however, does not claim that it could make such a showing. Rather, it contends that its prosecution of respondent must be considered proper unless someone - presumably respondent - shows that 'there is some substantial relation between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of the information used in the investigation or the evidence presented at trial.' We could not accept this submission with repudiating the basis for our conclusion in Kastigar that the statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege itself. *Hubbell* Slip Op. at p. 18, Citation Omitted.

The *Hubbell* opinion also bolsters Defendant-Cueto's claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and progeny. First, the fact that had the Grace letter been disclosed, it would have triggered a *Kastigar* hearing, establishes beyond doubt the materiality element of Cueto's *Brady* claim. Of course, once materiality is established under *Brady* by definition the error is not harmless and a new trial is required. See *Kyles v. Whitley*, "le 514, U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Second, *Hubbell*

bolsters the claim under-*Brady* that production of the "Grace letter" would have destroyed the effectiveness of Grogan, the ethical expert, along with significant aspects of the Government's theory, so that the verdict at bar cannot be worthy of confidence. There is a "reasonable probability" at the minimum, that had the Grace-letter been disclosed, the outcome of the trial could have been different.

SUPPLEMENT TO POINT 5 OF DEFENDANT'S 2255

Apprendi v. New Jersey, No. 99478
(2000 WL 807189 decided June 26, 2000)

In Point 5 of defendant's 2255 petition, defendant contends that his sentence "Was in excess of the maximum authorized by law", and that "the court was without jurisdiction to impose such sentence" as was imposed against the defendant. In addition to the preceding pleadings filed in support of defendant's position in Point 5, the defendant requests the Court to consider the impact of the recent Supreme Court opinion issued in the case of *Apprendi v. New Jersey*, No. 99478 (2000 WL 807189) in determining that defendant's Fifth and Sixth Amendment rights were violated in the determination of his sentence.

The court in the majority opinion found that the defendant's constitutional rights were violated when the trial court was allowed to enhance the defendant's sentence without providing the defendant a jury trial or requiring proof beyond a reasonable doubt on the specific factual issues that resulted in the increased sentence. The court stated:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With the exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S., at 252-253 (opinion of STEVENS, J.); see also id. at 523 (opinion of SCALIA, J.).

During the sentencing hearing the Court made specific factual finding in defendant's case, which dramatically enhanced defendant's sentence above the base level of ten in group one and a base level of twelve in groups two and three. The Court made the following statements during the sentencing hearing on September 19, 1997:

> **Specific Offense Characteristic, U.S.S.G. § 2CI.7(b)(1)(B):**
>
> I am confident that there was more than ample material to show that the Mayor of the Village of Washington Park, the Chief of Police of the Village of Washington Park, were actually coconspirators, and could qualify even under the defendant's objections; and that they were public officials under the guidelines; and that these parties were involved substantially in carrying out the purpose of the conspiracy. . .

Accordingly, I am going to rule this objection against the defendant, and determine that it is appropriate to add eight levels in Group 1, pursuant to Section 2C1.7(b)(1)(B). (+8 Group 1.) (Transcript of Sentencing, pages 33 and 34)

Adjustment for Role in the Offense, U.S.S.G. § 3B1.1(a):

I am going to determine there is ample evidence in this matter to show that the defendant was an organizer and leader of a criminal activity that involved five or more participants, or that was otherwise extensive. (+4 to Groups 1, 2 and 3.) (Transcript of Sentencing, page 35)

Adjustment for Obstruction of Justice, U.S.S.G. § 3B1.1(a):

I'm going to determine, after giving this matter substantial consideration, that the defendant did in fact perjure himself, both to me and to the jury, about matters crucial to the question of his guilt at the time of his testimony.

I feel that this finding, in and of itself pursuant to the authorities that I have just cited, is sufficient to determine that there should be a two-level increase, pursuant to the provisions of Section 3C1.1. (+2 to Groups 1, 2 and 3.) (Transcript of Sentencing, pages 39 and 40)

Specific Offense Characteristic, U.S.S.G. § 2J1.2

I find that in these areas, that the Government's position is more persuasive, and I determine therefore that there was a substantial interference with

the administration of justice, which did in fact result in unnecessary expenditure of governmental or court resources, and which warrants the addition of three levels in Count 2 and Count 3, pursuant to the provisions of Section 2J1.2(b)(2). (+3 to Groups 3 and 3.) (Transcript of Sentencing, page 46)

Adjustment for Role in the Offense, U.S.S.G. § 3B1.3:

I am convinced that the defendant, as an officer of this court, abused his position as an officer of the court, and therefore a position of trust in carrying out the unlawful scheme.

So I am going to overrule the objection and determine that the two-level increase is applicable in Group 2 and Group 3, pursuant to the provisions of Section 3BI.3. (+2 to Groups 2 and 3.) (Transcript of Sentencing, page 47)

Justice Scalia in a brief, but extremely direct opinion stated:

Justice Breyer proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to "subject the defendant to a legally prescribed punishment must be found by the jury.

Justice O'Conner observed in her dissenting opinion in the *Apprendi* at page 29: "As I have explained, the Court does not say whether these schemes are constitutional, **but its reasoning strongly suggests that they are not**. Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a flood of petitions by convicted defendant." (Bold added for emphasis)

Defendant has been in custody since October 1, 1997. Without the above enhancements that the court imposed, defendant would have already served even the maximum sentence under the guidelines and would have been released from custody.

CONCLUSION

In an opinion seemingly written for the case at bar, the United States Supreme Court decision in *Hubbell* requires that Defendant-Cueto be granted a new trial, which must be preceded by a *Kastigar* hearing. This was the relief afforded Oliver North and, in effect, Webster Hubbell, whose indictment was dismissed when the Government acknowledged that it could not meet its "heavy burden" under

In the alternative to granting a new trial, defendant's sentence should be vacated and he should be released from custody.

Respectfully submitted,
/s/ Bruce N. Cook
BRUCE N. COOK, #00507660
ATTORNEY FOR DEFENDANT

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